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No. 06-

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

MILTON MCDANIEL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When an employee covered by the Federal Employers' Liability Act ("FELA") settles a claim for occupational injury with an employer, does section 5 of FELA, 45 U.S.C. § 55, impose special restrictions on the freedom of the parties to include in the settlement a release of other potential occupational injury claims, or do "the releases of [FELA] employees stand on the same basis of the releases of others," as this Court stated in *Callen v. Pennsylvania Railroad*, 332 U.S. 625, 630 (1948)?

2. If section 5 of FELA does impose special restrictions on such releases, as the Mississippi Supreme Court held, which among the various competing standards adopted by the federal courts of appeals and state appellate courts, or other possible standards, governs the validity of those releases?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court below were Illinois Central Railroad Company ("ICRR"), petitioner herein, Milton McDaniel, respondent herein, and Bettye C. McWilliams, Executrix of the Estate of Larry McWilliams, Deceased. ICRR is not seeking review of those portions of the judgment below that relate to Bettye C. McWilliams or her decedent.

RULE 29.6 STATEMENT

Petitioner is a wholly owned subsidiary of Illinois Central Corporation, which is a wholly owned subsidiary of Grand Trunk Corporation, which is a wholly owned subsidiary of Canadian National Railway Company, a publicly held corporation. No other publicly held corporation owns more than 10% of ICRR's stock.

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On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Illinois Central Railroad Company respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court.

OPINIONS AND ORDERS BELOW

The *en banc* opinion of the Mississippi Supreme Court, as substituted on rehearing (Pet. App. 1a-20a) is not yet reported in Southern Reporter, Second Series, but is available from Westlaw at 2006 WL 2506739. The trial court's judgment (Pet. App. 21a-23a) and the transcript containing its bench ruling in support of that order (Pet. App. 24a-41a) are unreported.

JURISDICTION

The judgment of the Mississippi Supreme Court for which review is sought was entered on June 15, 2006. The Mississippi Supreme Court denied a timely petition for rehearing, but entered a new *en banc* opinion expressly superseding its initial opinion, on August 31, 2006. Pet. App. 1a-20a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES OR OTHER PROVISIONS INVOLVED

This case concerns section 5 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 55, which is reproduced in the Appendix (Pet. App. 42a).

STATEMENT OF THE CASE

Milton McDaniel ("respondent"), then an employee of ICRR, made a claim against ICRR under FELA arising out of an accident in which he suffered a back injury in 1998. In 1999, in consideration for a payment from ICRR of $400,000, he contracted to settle his accident claim and included in the settlement contract a release that covered future claims based on specifically identified risks, including exposure to asbestos. Pet. App. 15a, ¶ 29; Pet. App. 43a-47a. When he signed the release, he was awaiting the results of an asbestos screening x-ray that he had undergone one month earlier, which had been arranged by his attorneys with a view to litigation. Pet. App. 13a, ¶ 26.[1]

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[1] It is undisputed that respondent raised the issue of his asbestos screening x-ray and the potential that he might have claims against ICRR for asbestos-related injuries in the course of the negotiations that led to the 1999 settlement and release, although the parties did dispute, and none of the courts below resolved, what exactly was said about that issue.

The release expressly allocates to respondent the risk that the medical information he possesses regarding himself is inaccurate: respondent "is taking the risk that what he was told by any doctor or other person with regard to his injuries may have been wrong and the doctor or other person

One year later, respondent joined as a plaintiff in a large multi-plaintiff action under FELA, alleging injury as a result of workplace exposure to asbestos.[2] In 2001, before trial, ICRR agreed with the plaintiffs in that action on a binding settlement procedure, which provided for payments conditioned on the provision by plaintiffs of certain documentation regarding their employment, medical history, and claimed injury. Under the agreement, ICRR expressly reserved the right to refuse payment on several grounds, including prior release. *See* Pet. App. 2a-3a, 11a-12a, ¶¶ 4, 22.

When ICRR declined to pay respondent, because of his prior express release of asbestos-related claims in the 1999 settlement, respondent moved to enforce the 2001 agreement. The trial court ruled for respondent, Pet. App. 21a-23a, and ICRR appealed to the Mississippi Supreme Court, which affirmed, Pet. App. 1a-20a. The court held that the release was invalid under section 5 of FELA, which prohibits contractual "exemptions" from FELA liability of rail and maritime employers for injuries to their employees. The court deemed the release an invalid "exemption." It applied two conflicting rules derived from prior federal court of appeals decisions—a Sixth Circuit rule that the Mississippi Supreme Court (in common with several other courts) read as requiring "a known claim for a specific injury" as a predicate for a valid release, *Babbitt v. Norfolk & W. Ry.*, 104 F.3d 89, 93 (6th Cir. 1997), and a Third Circuit rule that only potential

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may have made mistakes with respect to the injuries, condition or disease involved." Pet. App. 45a. Given that respondent expressly released ICRR with respect to "alleged exposure . . . to asbestos," Pet. App. 44a, and that he expressly undertook the risks of medical error, the Mississippi Supreme Court's decision to refuse to apply the release to asbestos claims on the basis that respondent had not yet received his x-ray results, Pet. App. 13a, ¶ 26, fundamentally alters the settlement negotiated by the parties.

[2] *Allen v. Ill. Cent. R.R.*, Civ. No. 2000-100 (Cir. Ct. Jefferson Cty., Miss.) ("*Allen*").

claims for "specifically known risks" can be validly released, and only subject to complex and onerous additional requirements which must be determined by a "very fact-intensive process," *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 701 (3d Cir. 1998), *cert. denied*, 525 U.S. 1012 (1998). Pet. App. 13a-16a, ¶¶ 25-29, 31. The Mississippi Supreme Court did not attempt to reconcile these divergent standards.

The ruling below conflicts with this Court's decision in *Callen v. Pennsylvania Railroad*, 332 U.S. 625 (1948). In *Callen*, this Court explained that FELA's prohibition against "exemptions" from FELA liability does not apply to "releases" of liability, because a release "is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." *Id.* at 631. *Callen* held that FELA releases are subject to the "same" law as other releases, and thus are valid, absent fraud or mutual mistake. *Id.* at 630.

In the present case, the Mississippi Supreme Court expressly acknowledged that the provision it deemed invalid under section 5 of FELA was a "release" (while denigrating it as a "general" or "blanket" release). Pet. App. 13a-14a, ¶¶ 25, 26, 28. The Mississippi courts did not find fraud or mutual mistake. Nor were there any plausible public policy or equitable grounds for distinguishing *Callen*. The release was clear, specific, and unambiguous in its inclusion of injuries related to asbestos exposure; the alleged asbestos exposure occurred prior to the negotiation of the release; and the plaintiff was fully aware of, and was, indeed, awaiting results of medical tests for, potential consequences of his exposure to asbestos when he negotiated the release. Rather, the Mississippi Supreme Court misconstrued *Callen* as limited to releases of claims that "ar[i]se out of the specific injury alleged," thus assigning all broader, "general" releases to the category of "exemptions" prohibited by section 5 of FELA. Pet. App. 15a-16a, ¶ 30.

In doing so, the Mississippi Supreme Court joined multiple other appellate courts in a series of recent rulings that have supplanted *Callen*'s clear "release"/"exemption" distinction with a variety of complex and conflicting restrictions on what releases, in what circumstances, will be acknowledged as valid releases rather than being deemed invalid "exemptions." At a minimum, there is now a mature and acknowledged three-way split in the federal courts of appeals, with appellate courts in multiple states similarly divided, concerning when an express release of FELA claims is not a release, but instead an invalid "exemption." *First*, the Sixth Circuit in *Babbitt* stated its "known claim" standard, which the Mississippi Supreme Court and other courts have since read as applicable to releases contained in agreements that settle occupational injury claims. *Second*, as the Mississippi Supreme Court noted, the Third Circuit expressly declined in *Wicker* to adopt the "known claim" standard, instead allowing releases of "specifically known risks" subject to additional onerous and complex requirements. Pet. App. 14a, ¶¶ 27-28. *Third*, the Eleventh Circuit has adopted a less onerous rule, which requires only that released potential claims be for "known risks," without any further requirements. *Sea-Land Serv., Inc. v. Sellan*, 231 F.3d 848, 852 (11th Cir. 2000).

These different rules yield materially different results. Respondent did not have a "known claim for a specific [asbestos-related] injury," as required by the Mississippi Supreme Court's interpretation of the Sixth Circuit rule, when he signed the 1999 release, and the Mississippi Supreme Court also concluded that the "fact-intensive" inquiry mandated by the Third Circuit favored invalidation of the release. But the release plainly met the requirements of the Eleventh Circuit's test: asbestos-related injury was certainly a "known risk," since respondent had just been tested for precisely such an injury and discussed the potential for claims for such an injury in the course of negotiating the release, which specifically covered such injuries on its face.

The decision below thus meets two of this Court's established criteria for review. It conflicts with this Court's precedent, *see* SUP. CT. R. 10(c), and it also implicates and exacerbates a mature and complex division of authority between several federal courts of appeal and state courts of last resort, SUP. CT. R. 10(b).

The statutory context and practical implications of the decision below and those upon which it relied also militate in favor of review. This Court has historically been vigilant to resolve conflicts under FELA because "uniform application" of the statute "throughout the country [is] essential to effectuate its purposes." *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 361 (1952).[3] This acknowledged need for uniformity is accentuated by FELA's liberal venue rules, which create opportunities for forum-shopping among state and federal courts if they apply different rules.

Uniform and clear rules are especially important in the practical context of *settlements* of FELA claims. By restoring the simple and clear *Callen* rule that validates "releases" while invalidating "exemptions," this Court could forestall litigation seeking the judicial rewriting of thousands of settlements of FELA claims that have been entered into voluntarily in reliance on that rule, and could at the same time assure railroads, other employers subject to FELA, and their em-

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[3] *See also S. Buffalo Ry. v. Ahern*, 344 U.S. 367, 370 (1953) (Congress "intended" FELA to be a "uniform scheme"); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942) ("[FELA] requires uniform interpretation"). Congress also addressed the importance of uniformity, with an explanation that still has force a century later:

> A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.

H.R. Rep. No. 60-1386, at 3 (1908).

ployees that future settlements voluntarily entered into will be honored in accordance with their express and specific terms. Restoring *Callen* would thus facilitate and encourage the prompt and just settlement of FELA disputes, including asbestos claims, that would otherwise clog the courts.

By contrast, if the Court allows the morass of competing standards for judicially invalidating releases of FELA claims to remain, new settlements will be discouraged; comprehensive settlements will be replaced with piecemeal settlements, if any; employers subject to FELA may hesitate to compensate claimants until their injuries are fully "known" or their risks are "specifically known"; old settlements will be relitigated; and forum-shopping and disputes over the application of "fact-intensive" judicially created standards for the invalidation of settlement terms will generate further litigation and transaction costs.

Accordingly, this Court should grant review so as to re-establish a clear, uniform rule governing the validity of releases in FELA settlements. ICRR invites the Court to reaffirm the rule of *Callen*, and to make clear that FELA releases are not subject to any limits beyond those applicable to all other releases. Alternatively, if the Court believes that additional limitations beyond *Callen*'s are required under section 5 of FELA, it should take this opportunity to resolve the circuit split by providing an authoritative articulation of those limitations, on which parties can rely in settling asbestos and other occupational exposure claims under FELA, and on which parties and the courts can rely in assessing efficiently and reliably whether such claims have been validly released.

A. Statutory Background

In 1908 Congress enacted FELA because it "was dissatisfied with the common-law duty of the master to his servant." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 507 (1957). The traditional common law rules made it difficult for railroad

workers to recover for injuries sustained on the job, and the various states applied inconsistent tort law rules. Accordingly, FELA modified the common law of the states and established a uniform national standard. For example, the Act abolished certain common-law defenses, and, in section 5, sought to prevent employers subject to FELA from "exempting" themselves out of liability to their employees through contracts. *See* S. Rep. No. 60-460, at 2-3 (1908). Thus, FELA provides, under federal law, remedies that in most other industries are matters of state workers' compensation law, with no right to seek a remedy in court. FELA now applies not only to railroad employees but to seamen and longshoremen across the country.[4]

Section 5 states that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to *exempt itself from any liability* created by this chapter, shall *to that extent* be void." 45 U.S.C. § 55 (emphasis added).[5] Federal law governs the validity of releases under FELA. *Dice*, 342 U.S. at 361. The party attacking a release bears the burden of showing that specific provisions of the release are invalid. *Callen*, 332 U.S. at 629-30. Section 5 was not aimed at negotiated settlements of litigation or pre-litigation claims or potential claims, and it did not address the traditional policy in favor of such settlements. Instead, it was enacted to foreclose an anticipated practice whereby railroads might insist that their employees "discharg[e] the company from liability for personal

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[4] *E.g.*, *Am. Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994).

[5] Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie v. Thompson*, 337 U.S. 163, 174 (1949).

injuries" as a condition of employment. H.R. Rep. 60-1386, at 6 (1908). Section 5 was "designed to protect railroad workers and seamen from overreaching *as a condition of either obtaining or maintaining employment,*" and is not violated in the absence of such overreaching. *Sea-Land,* 231 F.3d at 851 (emphasis added).

Many FELA claims are brought and litigated in state court, as here, because FELA claims may be brought in federal or state court, 45 U.S.C. § 56, and are ordinarily not removable from state court, 28 U.S.C. § 1445(a). The plaintiff in a FELA case often has a range of federal and state courts in which to sue.[6] However, the same federal law governs FELA claims in federal and state court.

B. Factual Background

This case arises out of a complaint based on personal injuries allegedly sustained by respondent as a result of his exposure to asbestos while an employee of ICRR. Respondent had made a prior claim against ICRR for occupational injury. This prior claim was settled with a payment of $400,000 by ICRR and execution of a release by respondent in 1999. As the Mississippi Supreme Court acknowledged, the release expressly covered future injury claims for exposure to a variety of occupational hazards, including asbestos. Pet. App. 15a, ¶ 29. A copy of the release appears at Pet. App. 43a-47a.

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[6] The multi-state nature of employment covered by FELA means that employees may sue in federal or state courts in several states. Under FELA's liberal venue rules, plaintiffs may sue in any jurisdiction where the railroad operates. 45 U.S.C. § 56; *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263, 265 (1949). ICRR and its affiliates currently operate in 16 states in eight circuits, including the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh. Other railroads also operate in multiple circuits and states.

One year later, in 2000, respondent became a plaintiff in *Allen*, a large multi-plaintiff case filed against ICRR under FELA in state court, alleging that he had sustained an asbestos-related condition from exposure while working for ICRR. ICRR entered into an agreement establishing a settlement procedure in the *Allen* case. The procedure provided for substantial payments to each plaintiff, on the condition that they produced specified information and were not subject to certain defenses, including prior release. When ICRR declined to make the settlement payments to certain plaintiffs in *Allen*, including respondent McDaniel, they filed a motion in the Mississippi trial court to enforce the agreement. *See* Pet. App. 3a, ¶ 5.

As to the prior release issue, McDaniel asserted that his release was invalid because, when he signed his release, he had not been aware that he had claims for the occupational exposure identified in the release he had signed and provided to ICRR. The trial court found that respondent had no pending asbestos claim when he signed the 1999 release. Pet. App. 33a-35a. Purporting to rely on *Babbitt, Wicker*, and *Damron v. Norfolk & W. Ry.*, 925 F. Supp. 520 (N.D. Ohio 1995), the trial court held that the releases executed by respondent McDaniel and certain other plaintiffs did not bar their recovery under the *Allen* settlement procedure. Pet. App. 34a-35a. The court made no finding of any fraud by ICRR or mutual mistake.

C. Proceedings in the Court Below

From the judgment in *Allen*, ICRR appealed to the Mississippi Supreme Court and challenged the trial court's judgment in favor of the respondent on the release issue (and rulings for plaintiffs on other issues not involved here).[7]

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[7] In turn, one respondent cross-appealed seeking review of another of the trial court's rulings not at issue here.

The Mississippi Supreme Court endorsed what it understood to be the Sixth Circuit's "known claim" test in *Babbitt*. Pet. App. 13a, ¶¶ 25, 26. The decision also purported to endorse the Third Circuit's "specifically known risk" test in *Wicker*, which had rejected *Babbitt*'s "known claim" test. The Mississippi Supreme Court noted that *Wicker*'s "specifically known risk" test entails a "'very fact-intensive process.'" Pet. App. 14a, ¶ 27 (quoting *Wicker*, 142 F.3d at 701). It opined that both *Wicker* and *Babbitt* "disfavored" "the dreaded 'laundry list' general release," Pet. App. 15a, ¶ 29, and deemed the generality and breadth of the release respondent had signed fatal to its validity, Pet. App. 15a-16a, ¶¶ 29-31. The opinion did not identify or suggest any fraud by ICRR in securing the release, or any mutual mistake.[8]

REASONS FOR GRANTING THE PETITION

"[T]he scope of § 5 is of fundamental importance in the administration of [FELA]." *Duncan v. Thompson*, 315 U.S. 1, 5 (1942). The decision below directly conflict with this Court's precedent applying section 5 to FELA settlement agreements, and exacerbate an already mature and acknowl-

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[8] In a parallel litigation the same trial court had made similar rulings. ICRR's appeal in that case was heard by a different panel of the Mississippi Supreme Court in *Illinois Central Railroad v. Acuff*, which made no reference to the prior decision in *McDaniel*, declined to apply the "known claim" test derived from *Babbitt*, but endorsed the fact-intensive "specifically known risk" test of *Wicker*. 2006 WL 2168122, at *10-*11 (Miss. Aug. 3, 2006). ICRR is currently considering whether to file a petition for certiorari in that case, which would be due on January 10, 2007. (In an unreported order, the Mississippi Supreme Court denied rehearing in *Acuff* on October 12, 2006.) A similar issue has arisen in other litigation, where a Mississippi trial court recently ruled, citing the Mississippi Supreme Court's decision in this case, that a prior explicit release of claims associated with asbestos exposure, negotiated in connection with an injury unrelated to asbestos exposure, is not a bar to a later claim for asbestos-related injury. *McElhenny v. Ill. Cent. R.R.*, Civ. No. 2002-495 (Cir. Ct. Holmes Cty., Miss. Nov. 17, 2006).

edged conflict in both the federal circuits and state appellate courts. This Court's review is necessary to clarify the validity of a general release, made as part of an agreement settling FELA claims, in the absence of any fraud or mutual mistake. In *Callen*, this Court held that such a release does not offend FELA's prohibition against liability "exemptions," and is enforceable on the "same" basis as other releases, without any limitations as to "known claims" or "specifically known risks." ICRR respectfully urges the Court to reaffirm that holding, from which the decision below and several other recent decisions have strayed.

The question presented is important not only to the many FELA cases brought in state and federal court each year, but also to the far larger volume of FELA claims that are resolved by negotiation and agreement and do not end up in court. Settlements provide compensation promptly, fairly, and efficiently by voluntarily allocating risks in circumstances of uncertainty. Allowing railroads, other employers subject to FELA, and their employees to enter into fully enforceable settlements before risks, injuries, and/or claims are fully "known" is consistent with FELA's goals of fair compensation for alleged workplace injuries. By invalidating the release in this case, the state supreme court has called into question thousands of FELA settlements reached with employees that include the release of future asbestos or other occupational hazard claims, and it has injected substantial uncertainty into the settlement process. In sum, this Court's review of the questions presented here is warranted.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT ESTABLISHING THE VALIDITY OF GENERAL RELEASES IN FELA SETTLEMENTS.

More than a half century ago, this Court established the validity of general releases under section 5 of FELA for

future, unaccrued causes of action. In *Callen*, the Court explained that a general release of future claims executed after an alleged wrongful act is committed does not offend FELA's prohibition of liability exemptions. 332 U.S. at 630-31. In the decision below, the Mississippi Supreme Court misconstrued *Callen*.

In *Callen*, the plaintiff-employee sustained a back injury while working and entered into a settlement agreement with the employer-railroad. *Id.* at 626-27. For cash received the plaintiff executed a general release—in what could fairly be described as "boilerplate" terms—of his claims arising out of the accident that caused the back injury (for "'all claims and demands which [plaintiff] ha[s] or can or may have against [the railroad]'"). *Id.* at 626. Significantly, at the time the plaintiff executed the general release, he had not been diagnosed with, and was unaware that he had sustained, a permanent back injury. *Id.* at 627.

Subsequently, when the plaintiff sought damages under FELA for a severe and permanent back injury, this Court upheld the general release as a bar to that claim. In rejecting the plaintiff's argument that the release violated section 5 of FELA, the Court stated:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 631. Moreover, the Court explained that "until the *Congress* changes the statutory plan, the *releases of railroad employees stand on the same basis as the releases of others*." *Id.* at 630 (emphasis added). The fact that the employee did not know he had a permanent back injury was irrelevant to the validity of the release. Hence *Callen* makes clear that, where there is an injury claim, and a bona fide compromise of

that claim—including a release of future claims known or unknown—the release is valid under FELA, absent fraud or mutual mistake.

Here, the respondent had made a specific claim for damages arising from hazards he had been exposed to on the job. He knew that he was at risk of contracting an asbestos-related disease due to his past exposure to asbestos; indeed, he had been x-rayed to screen for asbestosis, for the purpose of potentially bringing a claim against ICRR, just a month earlier, and he discussed that potential claim with ICRR. For substantial consideration, he then executed a bona fide compromise of his claims, which included an express release of claims concerning asbestos exposure. There has been no finding that that release was in any way fraudulent or that it was based on any mutual mistake. The ruling below is, therefore, irreconcilable with *Callen*, and should be reviewed by this Court.

II. THE DECISION BELOW EXACERBATES A MATURE AND ACKNOWLEDGED CONFLICT AMONG THE FEDERAL COURTS OF APPEAL AND STATE APPELLATE COURTS CONCERNING THE VALIDITY OF FELA RELEASES.

The ruling below also merits this Court's review for an independent but related reason. It exacerbates a well-developed conflict among the various lower appellate courts that have abandoned this Court's bright-line distinction between releases and "exemptions" in *Callen*, and that have then proceeded to articulate various inconsistent criteria for when a release will be deemed a prohibited "exemption." These decisions have splintered in at least three different directions.

A. The "Known Claim for a Specific Injury" Test

In *Babbitt*, the Sixth Circuit addressed a release by a railroad employee who accepted a "buy-out" or severance

from the company. 104 F.3d at 90. The plaintiff-employee signed an agreement releasing the railroad from any and all claims the employee may have had against the company, known and unknown. Subsequently, the employee brought a FELA claim for hearing loss. *Id.*

The Sixth Circuit stated a bright-line rule for upholding releases under section 5 of FELA: "[t]o be valid, a release must reflect a bargained-for settlement of a *known claim for a specific injury*, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Id.* at 93 (emphasis added). In reversing summary judgment that had been granted to the railroad by the court below in light of the release in the severance agreement that was before it, the Sixth Circuit did not go so far as to mandate that, even if there is a settlement of a known claim that provides a sufficient predicate for a release, the scope of the release must be limited to known claims for specific injuries. However, subsequent cases, including the decision below, have read *Babbitt* as authority for a bright-line rule that not only requires a known claim as a predicate for a release, but also limits the scope of releases to known claims. This bright-line rule directly conflicts with *Callen* by severely limiting the scope of liability releases that can be contained in agreements to settle existing or potential FELA claims.

In the present case, the Mississippi Supreme Court relied on *Babbitt* and its "known claim" test as "compelling authority," Pet. App. 16a, ¶ 31, while also relying on the concededly different test adopted by the Third Circuit in *Wicker, see id.* Other appellate courts have applied *Babbitt* to occupational injury settlement agreements more unambiguously. *E.g.*, *Stephens v. Ala. State Docks Terminal Ry.*, 723 So. 2d 83, 86-87 (Ala. Civ. App. 1998) (relying on *Babbitt* in finding that a post-injury general release does not apply to a new injury or aggravation of an old injury); *Anderson v. A.C. & S., Inc.*, 797

N.E.2d 537, 543-44 (Ohio Ct. App. 2003) (relying on *Babbitt* to hold that release of liability for known asbestosis did not extend to mesothelioma that subsequently developed as result of plaintiff's exposure to asbestos), *appeal not allowed,* 804 N.E.2d 40 (Ohio 2004), *cert. denied,* 543 U.S. 926 (2004); *Knoth v. Ill. Cent. R.R.*, No. 2005-CA-001882-MR, 2006 WL 1510782, at *1 (Ky. Ct. App. June 2, 2006) (applying *Babbitt* "known claim" rule).

B. The Basic "Known Risk" Test

Other appellate courts have expressly rejected the "known claim" rule, beginning with the Third Circuit in *Wicker.* Although *Wicker* led the way with its "specifically known risk" test, we first address the simpler "known risk" test later propounded by the Eleventh Circuit before discussing the more complex and onerous "specifically known risk" test adopted in *Wicker*, a variant of which was applied in the decision below.

In *Sea-Land,* the Eleventh Circuit upheld a post-injury settlement release given by a seaman under FELA. The court refused to apply the *Babbitt* test, and instead applied the basic "known risk" criterion articulated by the Third Circuit in *Wicker*, but without the additional requirements imposed by the Third Circuit and on which the Mississippi Supreme Court relied in the present case. The Eleventh Circuit held:

> "a release does not violate § 5 [of FELA] provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed."

Sea-Land, 231 F.3d at 852 (quoting *Wicker,* 142 F.3d at 701).

The Mississippi Supreme Court's decision in the present case plainly conflicts with that standard, since asbestos-related risks indisputably were "known" at the time of the release:

respondent had been x-rayed for them a month earlier, he had discussed potential claims for them with ICRR during the settlement negotiations, and they were expressly included in the settlement. Other appellate courts have, however, joined the Eleventh Circuit in applying the "known risk" test without additional onerous requirements. *E.g.*, *Loyal v. Norfolk S. Corp.*, 507 S.E.2d 499, 503-04 (Ga. Ct. App. 1998) (broad awareness within the railroad industry of the risk at issue, with cases "legion all over the country" when release was signed); *see also Aswad v. Norfolk S. Ry.*, No. 04-2536, 2006 WL 1063297, at *17, *19 (Va. Cir. Ct. Apr. 18, 2006) (rejecting *Babbitt* and following *Wicker*'s "known risk" standard "as modified by" *Loyal* to recognize that risk may be "known," and liability relating to that risk may validly be released, without risk being specifically identified in release; holding that plaintiff must prove he was unaware of and could not "foresee" risk of silicosis in order to invalidate general release he had signed with respect to his subsequent silicosis claim).

C. The Fact-Intensive "Specifically Known Risk" Test and the Mississippi Supreme Court's Antipathy to General Releases

In *Wicker,* plaintiff-employees, who had previously signed general releases as part of injury claim settlements, brought suits alleging claims for new injuries. The Third Circuit perceived that "the proper application and reach of § 5 remains unclear," 142 F.3d at 698, noting that "lower courts that have addressed this issue have disagreed on the proper interpretation of § 5," *id.* at 699. It stated that, "[a]lthough the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts." *Id.* at 698.

The *Wicker* court did not succeed in clarifying the issue. At the same time as it created a circuit split by rejecting the

Sixth Circuit's rule, the Third Circuit promulgated a complex rule of its own mandating a "very fact-intensive process" of inquiry in order to determine whether a settlement agreement that involves no fraud, mutual mistake or offense to public policy should be enforced in accordance with its express terms. *Id.* at 701.

Wicker held that a FELA plaintiff may release future claims that cover "specifically known risks" even if "there is no present manifestation of injury," explaining that, "[w]hile the elusiveness of any such determination might counsel in favor of a bright-line rule such as the Sixth Circuit adopted in *Babbitt*, we decline to adopt one here." *Id.* at 701. The Third Circuit explained that the Sixth Circuit's rule was inimical to the interests of both employee and employer. It reasoned:

> [I]t is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury.

Id. at 700-01.

As a result, the Third Circuit held that a release does not violate section 5 "provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those *risks* which are *known* to the parties at the time the release is signed." *Id.* at 701 (emphasis added).

However, citing no statutory basis in section 5 or elsewhere, the Court of Appeals went on, as if acting as a legislature, to add an extensive "proviso" as to the enforceability of a FELA release. *Id.* The Third Circuit stated that a FELA

release should "chronicle" the scope and duration of known risks by "spell[ing] out the quantity, location and duration of potential risks to which the employee has been exposed." *Id.* Yet, even such detailed specificity, with the burdens it imposes on an employer, would at best only provide the employer "strong evidence" in support of a release defense. *Id.* Thus, the *Wicker* standard virtually assures that a measure intended to avoid litigation will itself require litigation to be effective. There is no indication that this is what Congress intended in section 5[9] or what this Court intended in *Callen.* Indeed, the Third Circuit acknowledged that the *Wicker* standard, which the Mississippi Supreme Court endorsed here, is a "more difficult . . . standard for railroad employers than is typical in non-FELA situations." *Id.* Yet it made no attempt to reconcile that more restrictive standard with this Court's ruling in *Callen* that, unless Congress amends FELA, releases of railroad employees "*stand on the same basis as the releases of others*," *i.e.*, other than railroad and maritime employees covered by FELA. 332 U.S. at 630 (emphasis added).

The Third Circuit also commented with disfavor that the releases at issue in *Wicker* involved "boilerplate" provisions including a "laundry list" of known risks to which the railroad employees may have been exposed. In endorsing *Wicker*'s "legislative" ruling, the decision below relies heavily on its language disparaging "boilerplate" and "laundry lists," *i.e.*, general releases that specifically identify and list as released multiple known risks associated with the workplace to which the employee may have been exposed. Pet. App. 14a-15a, ¶¶ 27, 29. Indeed, the decision below appears to go beyond

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[9] If Congress had wanted to do more to regulate FELA releases, as *Wicker* does, it could easily have done so, as it has with respect to other employment laws, by imposing further limitations in FELA. *E.g.*, *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) (federal statute imposed specific limits on waiver of claims by employees).

Wicker, which mandated a "fact-intensive" examination of multiple factors, including whether a "laundry list" of released risks fails to "reflect [the] intent" of the releasor. 142 F.3d at 701. Here, the Mississippi Supreme Court appears to have deemed the "laundry list" or general release context of the express asbestos-related claims release in this case fatal, *see* Pet. App. 15a, ¶ 29, despite much more compelling evidence that asbestos-related injuries were a "known risk," *viz.*, the fact that respondent had specifically contemplated, had himself x-rayed for, and discussed with ICRR, the potential for asbestos-related claims immediately before signing the release that expressly included them.

This prohibition, whether absolute or presumptive, on general releases of FELA claims is highly significant and troublesome. *Sea-Land* upheld a "general release," 231 F.3d at 850, and this Court in *Callen* upheld a release of "'all claims and demands which I have or can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained by me' at the time and place involved in the suit," 332 U.S. at 626-27. Indeed, the release in the present case is in a sense less "general" than those in *Callen* and *Sea-Land*, insofar as it enumerates a list of particular risks, including the risk of disease due to asbestos exposure, rather than purporting to encompass unidentified occupational injury risks.

Moreover, general releases serve important practical functions that piecemeal releases cannot fulfill. By proposing a "standard" or "form" draft release that lists multiple particular risks, the employer alerts the employee to the known risks that are apparent to the employer based on its past experience and knowledge of the workplace.[10] The use of standard or

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[10] Here there was no claim that respondent did not have the opportunity to take issue with the terms of the release, including its recitals. Nor is there any claim that ICRR refused to consider changes to the usual proposed "boilerplate" language, which contained a useful and informative

"boilerplate" language also fosters efficiency and consistency in contracts, including the settlement of recurring actual and potential occupational claims. *See generally, e.g.*, Symposium, *"Boilerplate": Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006).[11] This is particularly important with FELA, under which federal and state courts, rather than any administrative agency, are responsible for resolving workplace injury claims by rail and other employees covered by FELA.

Most importantly, general releases enable the parties to achieve a comprehensive settlement of claims, whereas piecemeal releases have less value in avoiding future litigation because they leave open the potential for unresolved claims and for litigation regarding the scope of the claims resolved. Because general releases are more valuable to potential or actual defendants than piecemeal releases, they tend to result in more compensation for claimants. *See Wicker*, 142 F.3d at 695 (finding that employees who sign general releases tend to receive larger settlements and that employers are willing to pay higher sums to settle claims under a general release). Settlements for general releases can also encompass and provide prompt compensation for uncertain and future claims without making the parties wait until all the details of an injury or risk are fully known. *See Loyal*, 507 S.E.2d at 502 ("Clearly, in an industry, such as the railroad industry, that has a number of

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list specifically identifying known risks to which the employee was or may have been exposed, even if the employee may not previously have been aware of it. Moreover, here there has been no claim that respondent was not aware of the risk of asbestos-related disease due to exposure to asbestos.

[11] Loose use of the vague term "boilerplate," which can have varied meanings in different contexts, obscures significant differences. But even seemingly "one-sided" contracts can have justifications that are in the public interest. *E.g.*, L. Bebchuk & R. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

known occupational risks and diseases, it is important to both the employer and employee to be able to settle potential claims regarding injuries or diseases prior to actual discovery."). Given these virtues of general releases, it is counterproductive for the "specifically known risk" test to insist that a release "spell[] out the quantity, location and duration of potential risks to which the employee has been exposed." 142 F.3d at 701; *accord* Pet. App. 14a, ¶ 27. Such insistence effectively mandates discovery as part of a settlement proposal, and invites follow-on litigation about the sufficiency and accuracy of the detailed disclosures it requires.

III. THIS COURT'S REVIEW IS NECESSARY TO RESTORE UNIFORMITY AND PREDICTABILITY TO THIS IMPORTANT AREA OF FEDERAL LAW.

It is antithetical to the "uniformity" mandate of FELA to federal and state courts (*Dice*, 342 U.S. at 361) for conflicting rulings in the lower courts on recurring issues to be left unresolved. For FELA's uniform federal law to be upheld, this Court must continue to be vigilant to address inconsistencies between the various federal and state courts from among which FELA's liberal venue rules allow plaintiffs to choose.

Uniformity is especially important with respect to contractual issues, such as the validity of releases of FELA claims. Railroads and other FELA employers will become increasingly reluctant to settle claims if they are unsure of which of a morass of differing, "fact-intensive," and complex standards will govern efforts to enforce even clear and unambiguous comprehensive settlements, especially when some of those standards prevent the parties from freely and knowingly allocating risks until after highly detailed information about the extent of injuries or risks is established.

If settlement is deterred, and if settlements become subject to relitigation in light of uncertain standards governing their

validity, everyone will suffer.[12] Employers will face heightened litigation risks and costs, employees will be unable to obtain prompt and efficient compensation by settlement, and the courts may face a deluge of new asbestos and other occupational injury cases. The inevitable result will be wasteful litigation. As of the end of 2002, about 58% of the $70 billion spent by American businesses on asbestos litigation had gone to transaction costs rather than to plaintiffs. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION xxvi (RAND Institute for Civil Justice 2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf. Legal uncertainty that discourages and impairs the effectiveness of settlement can only serve to increase that percentage. As this Court recognized in *Callen,* a clear rule that upholds unambiguous settlements in the absence of fraud or mutual mistake is as necessary in this context as in other contexts, and Congress has not provided otherwise.

The present case both exemplifies and exacerbates the lack of such needed clarity in the lower courts today. The Mississippi Supreme Court purported to endorse as "compelling" both a "known claim" rule and a "known risk" standard, despite the fact that the "known risk" standard arose from case law expressly rejecting the "known claim" rule. It then adopted the Third Circuit's complex and onerous "specifically known risk" variant of the "known risk" standard, to which it added what appears to be either an absolute or near-absolute prohibition on general releases. As a result, it invalidated a release of potential claims for asbestos-related injury despite the fact that respondent had,

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[12] There is a substantial inventory of releases negotiated in the 1990s or earlier that would not likely have anticipated the novel requirements of *Babbitt* or *Wicker*. However, at the time of such releases asbestos had been well known for years as one of the risks to which railroad employees are often exposed, as FELA claims based on exposure to asbestos were already common by then.

one month before signing the release, undergone an x-ray to evaluate the known risk of such injury.

The disarray in the federal and state courts on this important issue under FELA stems from a disregard of *Callen*. There is no statutory basis for the draconian restrictions on the freedom to settle current and specifically identified potential occupational injury claims imposed by *Babbitt, Wicker*, and the decision below, and these cases ignore *Callen's* instruction that releases of FELA claims are to be treated consistently with releases of "other" types of claim.

Given the mature and acknowledged splits in the circuits and among the states, the fundamental importance of section 5, and the destructive effects of uncertainty upon efficient settlement of mounting asbestos-related and other FELA claims, this Court should act now to bring clarity and closure to the standards that apply to releases under FELA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 29, 2006

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2005-CA-00389-SCT

ILLINOIS CENTRAL RAILROAD COMPANY,

v.

MILTON MCDANIEL AND BETTYE C. MCWILLIAMS,
Executrix of the Estate of Larry McWilliams, Deceased,

and

KELLY C. ROBINSON,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

ON MOTION FOR REHEARING

DATE OF JUDGMENT:	12/08/2004
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	JEFFERSON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	LONNIE D. BAILEY GLENN F. BECKHAM EDWARD BLACKMON, JR. THOMAS R. PETERS
ATTORNEYS FOR APPELLEES:	THOMAS W. BROCK WILLIAM S. GUY WAYNE DOWDY
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	AFFIRMED - 08/31/2006
MOTION FOR REHEARING FILED:	07/20/2006
MANDATE ISSUED:	

EN BANC

SMITH, CHIEF JUSTICE, FOR THE COURT:

¶1. The motion for rehearing is denied. The original opinion is withdrawn, and this opinion is substituted therefor.

¶2. Plaintiffs filed suit against Illinois Central Railroad Company (ICRR) in the Circuit Court of Jefferson County under the case name *Robert Allen, et al v. Illinois Cent. R.R. Co.*, and pursuant to then existing Mississippi law regarding joinder and venue. Plaintiffs asserted their claims for asbestos related personal injuries under the Federal Employers Liability Act (FELA). 45 U.S.C. §§ 51-60 (1939). Prior to the commencement of trial in the matter, ICRR entered into a contingent settlement agreement with the remaining plaintiffs. Plaintiffs' counsel filed two separate motions with the circuit court to enforce the settlement agreement on behalf of a small number of the remaining plaintiffs, more than two years after the contingent settlement was agreed upon. After several hearings, the circuit court granted, in part, and denied, in part the plaintiffs' motion to enforce the settlement agreement, and overruled ICRR's motion to dismiss, and to compel production, to allow further investigation and discovery, and for findings and conclusions of law. ICRR, feeling aggrieved, appealed to this Court regarding the enforcement of the settlement between ICRR and plaintiffs Milton McDaniel (McDaniel) and Larry McWilliams (McWilliams). In addition, plaintiffs' counsel filed a cross-appeal, on behalf of plaintiff Kelly Robinson (Robinson), pertaining to Robinson's dismissal for not conforming to the applicable statute of limitations.

¶3. Finding no error, we affirm the findings of the circuit court.

FACTS

¶4. On June 19, 2001, counsel for ICRR sent a letter to plaintiffs' counsel stipulating the payment to thirteen spe-

cifically named plaintiffs in the cause of *Robert Allen, et al v. Illinois Cent. R.R. Co.* The letter also set forth a contingent payment procedure detailing the payment of negotiated amounts to the remainder of the plaintiffs involved in *Robert Allen, et al v. Illinois Cent. R.R. Co.* Pursuant to the agreed upon payment procedure, ICRR would not tender payment for any remaining plaintiffs' claims without receiving certain documentation from each individual plaintiff, including: a pulmonary questionnaire, authorizations, and medical documentation establishing the claimed disease process. Also, ICRR reserved the right to assert three defenses to payment under the conditional settlement agreement including a statute of limitations defense, evidence of a prior release, or if the plaintiff was never in the employment of ICRR. As both ICRR and the plaintiffs assert, numerous claims were settled in accordance with the established procedure.

¶5. In September 2003, and again in January 2004, after ICRR suspended settlement payments, the plaintiffs filed motions with the Circuit Court of Jefferson County prompting the circuit court to enforce the settlement agreement. ICRR would eventually oppose any further enforcement of the settlement due to alleged irregularities in the documentation of certain claims by way of its motion to dismiss certain claims in the case. The circuit court then entertained four separate hearings pertaining to issues raised in connection with these motions.

¶6. At the first two motion hearings, the circuit court reopened discovery and directed both parties to file briefs in anticipation of a final hearing on the settlement issues. At the succeeding motion hearing, the circuit court denied ICRR's motion to dismiss and granted the plaintiffs' motion to enforce the settlement agreement. Specifically, regarding the individual plaintiffs currently on appeal, the circuit court found that releases signed by plaintiffs McDaniel and McWilliams did not bar them from participation in the settlement

agreement. The circuit court also considered the claim of Robinson, and determined Robinson's cause of action was barred by the applicable statute of limitations. ICRR subsequently motioned the circuit court to reconsider its findings based on newly discovered evidence, to withhold entry of final judgment to allow further investigation, and for findings of fact and conclusions of law. The circuit court denied ICRR's motions in a final hearing on the issues, and ICRR perfected the present appeal with this Court regarding McDaniel and McWilliams. Plaintiffs perfected a cross-appeal with this Court regarding the circuit court's findings pertaining to the dismissal of Robinson from the action. After full consideration of the issues, we find no error by the trial court and accordingly affirm.

ANALYSIS

¶7. We have decreed on numerous occasions "[t]his court will not disturb the findings of the chancellor unless it is shown the chancellor was clearly erroneous and the chancellor abused his discretion." *Howard v. Totalfina E & P USA, Inc.*, 899 So. 2d 882, 888 (Miss. 2005) (citing *Hill v. Southeastern Floor Covering Co., Inc.*, 596 So. 2d 874, 877 (Miss. 1992); *Bell v. Parker*, 563 So. 2d 594, 597 (Miss. 1990)). Also, "a circuit judge sitting without a jury is accorded the same deference with regard to [] factual findings as is a chancellor." *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So. 2d 1355, 1358 (Miss. 1989) (citing *Hardy v. First Nat'l Bank of Vicksburg*, 505 So. 2d 1021, 1023 (Miss. 1987)). "Abuse of discretion is found when the reviewing court has a 'definite and firm conviction' that the court below committed a clear error of judgment and the conclusion it reached upon a weighing of the relevant factors." *Howard*, 899 So. 2d at 888 (citing *Caracci v. Int'l Paper Co.*, 699 So. 2d 546, 556 (Miss. 1997)).

I. MOTION TO ENFORCE SETTLEMENT AGREEMENT

¶8. ICRR asserts the circuit court committed reversible error by granting the plaintiffs' motion to enforce the settlement agreement and ordering ICRR to pay the requisite settlement amounts, in light of false affidavits submitted to ICRR by the plaintiffs. On appeal ICRR argues, specifically, both McDaniel and McWilliams provided false, sworn affidavits in an attempt to distill settlement funds from ICRR. McDaniel and McWilliams dismiss ICRR's claims as an attempt to distort innocuous details into facts constituting reversible error.

¶9. ICRR alleges it began to grow curious and concerned about the contingent settlement procedure sometime after it was agreed upon by the parties. ICRR asserts its concerns were piqued after it became aware of incongruities involving plaintiff Fred Tyler (Tyler) in a similar contingent settlement agreement.[1] During its investigation, ICRR discovered Tyler's participation in a previous, 1996 Jefferson County, asbestos case.[2] ICRR then learned Tyler was diagnosed with an asbestos related disease more than three years before filing suit against ICRR, thus allowing for a statute of limitations defense as set forth in the settlement agreement. According to ICRR, "Tyler's non-disclosure of his participation and settlements received in the *Cosey* case raised a red flag for ICRR." In response to ICRR's concerns in this case, counsel for the plaintiffs sent a letter to ICRR wherein the plaintiffs agreed to provide an affidavit from each remaining plaintiff regarding

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[1] *Eakins v. Illinois Cent. R.R. Co.*, Civil Action No. 2001-65 (Cir. Ct. of Jefferson County).

[2] *Cosey v. E.D. Bullard Company*, Civil Action No. 2001-65 (Cir. Ct. of Jefferson County) (eventually removed to U.S.D.C., No. 99-CV-164 (S.D. Miss.)).

all prior asbestos litigation.[3] This letter provided in pertinent part:

> With regard to the Tyler matter, we have spoken to Mr. Tyler. It is apparent that when Mr. Tyler was questioned about prior litigation, he understood that he was being asked about a prior case against the railroad. Also, the questionnaire that he signed states "Yes" as the response to the question about prior litigation against asbestos manufacturers.
>
> To make sure that this situation does not occur again, we will be supplying affidavits from all remaining unpaid *Allen* and *Eakins* plaintiffs regarding all prior asbestos litigation. If a plaintiff has been involved in prior litigation, we will provide you with any document that we can obtain for your review.

¶10. In accordance with the letter, the plaintiffs produced fifty-eight affidavits disclosing other asbestos litigation, and after an investigation of its own accord, ICRR determined fifty-six of the plaintiffs' affidavits were false. Specifically, ICRR claims McDaniel and McWilliams excluded information from their affidavits regarding their status as named plaintiffs in separate and additional asbestos cases. McDaniel's affidavit states:

> I have never been a plaintiff or a claimant in any asbestos suit other than *Allen v. ICRR*, No. 2000-100, in the Circuit Court of Jefferson County, Mississippi and *Alderson v. Garlock, Inc., et al*, No. 2002-124-CV3, in the Circuit Court of Jones County, Mississippi, Second Judicial District.

ICRR points out this affidavit fails to mention McDaniel's participation as a plaintiff in *McNeil v. Dresser Industries, Inc.*, 2002-283-CV9.

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[3] The first page of the facsimile letter dates the document April 22, **2002**; however this is apparently a mistake as the second page of the document sets the date correctly as April 22, **2004**.

¶11. Betty McWilliams, executrix of the estate of Larry McWilliams, submitted the affidavit ICRR takes issue with; it states:

> Larry L. McWilliams has never been a plaintiff or a claimant in any asbestos suit other than *Allen v. ICRR*, No. 2000-100, in the Circuit Court of Jefferson County, MS and *Moore v. Garlock, Inc. et al*, No. 2002-470, in the Circuit Court of Smith County, MS.

ICRR points out this affidavit fails to mention McWilliams' participation as a plaintiff in *McNeil, and Acuff v. American Optical Corporation*, 2003-159-CV8.

¶12. ICRR insists the plaintiffs' omissions of *McNeil* and *Acuff* from, not only the McDaniel and McWilliams affidavits, but also from twenty-nine additional affidavits, constituted an egregious and pervasive pattern of deception. Conversely, plaintiffs' counsel claim an unintentional mistake due to their own oversight resulted in the harmless absence of *McNeil* and *Acuff* from the affidavits. Plaintiffs point out both *McNeil* and *Acuff* were filed after the case at bar. Plaintiffs contend they therefore conformed to the procedure set forth in their letter, whereby they voluntarily agreed to furnish affidavits concerning only prior asbestos litigation, see supra.

¶13. The circuit court heard virtually identical arguments from both parties in open court. During the hearing the circuit court stated:

> I think this case will turn on what your supplemental agreement says. If the plaintiffs were only to disclose prior, and I emphasize "prior" participation in asbestos litigation, then I believe that the court should disregard this argument and allow them to recover provided they have complied with all other aspects of the settlement agreement. If it says to disclose all participation in asbestos litigation, both past and present, then that may be another situation, and I need to determine whether

> this is such bad faith of a material breach of the agreement that it warrants dismissal of the plaintiffs. I need to know what the supplemental agreement says.

The circuit court thereafter allowed both parties to argue their positions on omission of *McNeil* and *Acuff* from certain affidavits. The circuit court then made its findings on the record, and those findings, in pertinent part, were as follows:

> I believe you, counsel, that these things were omitted by inadvertence. I will suggest to you that when you're dealing with something that's—I mean, if we were talking about a simple letter, you inadvertently left something out of a letter to the Illinois Central or something to that effect, that's one thing, but when you're signing an affidavit or having people sign affidavits, if they're swearing to things that are inadvertently wrong, that can have serious consequences. I mean, an affidavit is something that you need to make sure is correct before you allow the plaintiffs or whoever to sign it. In any event, the errors have been discovered. I don't think there's any prejudice.

The circuit court then denied ICRR's motion to dismiss and granted the plaintiffs' motion to enforce the settlement agreement.

¶14. This Court agrees with the circuit court that the absence of *McNeil* and *Acuff* in the affidavits at issue was inadvertent, not willful and intentional as ICRR insists. Therefore, the circuit court did not abuse its discretion.

¶15. In addition, we remind the attorneys of this State that they should be very careful when signing, or having a client sign, a sworn statement such as an affidavit. Although sanctions were not deemed appropriate by the circuit court in this case, all attorneys should nonetheless heed the circuit court's warning that swearing to false or incorrect statements could result in a myriad of dire consequences. The process of sim-

ply reading and verifying what is being signed operates as a seine for filtering out potential drastic errors caused by a factually incorrect sworn statement. Thus, this Court finds that such a preemptive warning, or admonition, offered to the legal community by this Court will operate as a preventive measure, to combat future affidavit inconsistencies. Nevertheless, this issue is without merit.

II. MOTION TO RECONSIDER

¶16. Subsequent to the circuit court's grant of the plaintiffs' motion to enforce the settlement agreement ICRR filed its motion to reconsider the ruling, to compel production, for further discovery and investigation, and for findings of fact and conclusions of law. The circuit court heard ICRR's motion to reconsider its previous findings in open court. ICRR argued at the hearing that the circuit court abused its discretion when it failed to reconsider its findings in light of newly discovered evidence.[4] Further, ICRR asserted the circuit court committed additional error by refusing to compel production of documents, refusing to allow discovery, and refusing a request for the court's findings of fact and conclusions of law pursuant to M.R.C.P. 52(a).

¶17. After hearing arguments on the motion by both parties, the circuit court denied ICRR's motion to reconsider. Today, on appeal, ICRR presents this Court with virtually identical arguments as it presented to the circuit court. ICRR claims the circuit court abused its discretion by denying the motion to reconsider.

¶18. ICRR initially raised the issue of newly discovered evidence at the motion hearing. The majority of ICRR's argu-

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[4] ICRR claims to have new evidence that the plaintiffs were aware of *McNeil* and *Acuff* at the time they signed the affidavits at issue. ICRR insists two documents pertaining to *McNeil*'s current status in bankruptcy proceedings conclusively prove plaintiffs' counsel did not inadvertently omit *McNeil* and *Acuff* at the time the affidavits were drafted.

ment on newly discovered evidence consisted of a rehash of ICRR's previous arguments regarding the absence of *McNeil* and *Acuff* from the plaintiffs' affidavits. In response the circuit court echoed its findings from the previous hearing, see supra, by stating:

> I believe that there was no intent to defraud from what I've heard so far. It appears to me that there was a mistake made, and it was bad wording of your document that there was a mistake made and that the affidavit should have been worded differently, and I believe that. And I also believe that both you and your client should be more careful before they sign affidavits and anything of that nature under oath. I think that certainly they should be more careful and you should be more careful in instructing your clients. I will say that without hesitation; however, I don't see that there's any intent to defraud. From what I have before me at this point, I don't see any intent to defraud.

¶19. ICRR then requested the circuit court to compel production of documents regarding an addendum to a contract of employment between the plaintiffs and their attorneys. Regarding this request, the circuit court declared:

> Well, counsel [for ICRR], and I would grant that if there were something that you gain from the information that you're requesting. First, of all you need to understand the information that you're requesting is privileged.
>
> . . .
>
> I would order that that privilege be—that you produce the documents and things of that nature under exceptional circumstances, and if I felt that the information that you could obtain from reading these documents would show me that the language of this affidavit was intentional and that the folks intended to defraud you rather than a mistake in the drafting of the document by

> the attorney, then I might consider that, but I don't see any way it could possibly do that, so I'm not going to allow you to get those things.

¶20. At the conclusion of the hearing, the circuit court pointed out *McNeil* and *Acuff* were filed after the case at bar, thus there was no statute of limitations defense that could be raised, and ICRR agreed. Moreover, the circuit court did not find that any of ICRR's requests would lead to proof of its allegations. The circuit court ultimately denied ICRR's motion to reconsider its ruling regarding ICRR's motion to dismiss, and to compel production, to allow further investigation and discovery, and for findings and conclusions of law.

¶21. It is clear to this Court that the circuit court gave ICRR's motion for reconsideration due consideration. Furthermore, although this Court prefers trial courts to make separate particularized findings of fact and conclusions of law, general findings of fact and conclusions of law do not require reversal, and they technically conform to the requirements of M.R.C.P. 52. *Century 21 Deep South Props. Ltd. v. Corson*, 612 So. 2d 359, 366-67 (Miss. 1992). In this case, the circuit court made several findings on the record regarding its decision to deny ICRR's motion. Moreover, these findings are sufficiently situated as to allow this Court to make its own findings. In accordance with the circuit court's on-the-record findings, we find the circuit court did not abuse its discretion when it denied ICRR's motion. Thus, this issue is without merit.

III. RELEASES

¶22. ICRR now alleges it need not tender payment to either McDaniel or McWilliams because both previously released their asbestos claims against ICRR.[5] Specifically, ICRR in-

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[5] The contingent settlement procedure provided three defenses to payment for ICRR, see supra, and one of those defenses was a release of claim.

sists McDaniel personally released his claim by signing an occupational injury release, thereby releasing all personal injury claims he had against ICRR. Also, ICCR maintains McWilliams released his claim because his claim has already been settled pursuant to the settlement agreement.

McDaniel

¶23. In 1998, while employed by ICRR, McDaniel suffered a career ending back injury when he attempted to set a defective hand brake. Due to the injury he suffered, McDaniel sent his demands to ICRR's claims department. As evinced by ICRR memoranda, McDaniel and ICRR subsequently settled his claim for the back injury suffered. As part of the back injury settlement, McDaniel signed a document titled Final Settlement Release and Agreement Not to Return to Work. The language of this document released ICRR for a number of ailments, including exposure to asbestos, see infra. Although he was x-rayed approximately one month prior to signing the release, McDaniel's x-ray was not read until several months after the release was signed. Thus, McDaniel contends that at the time he signed the release at issue, he was not aware of his potential claim against ICRR for asbestos related injuries. Moreover, McDaniel maintains the release was ineffective as to his claim in this case.

¶24. Just as with every plaintiffs' claim in this case, McDaniel's claim was filed under FELA. Therefore, this Court must determine whether § 5 of FELA applies to McDaniel's claim because § 5 of FELA limits ICRR's ability to fully exempt itself from liability. Section 5 of FELA states in pertinent part "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . ." 45 U.S.C. § 55. The issue of release presently before this Court has previously been considered in two different federal circuits.

¶25. First, in *Babbitt v. Norfolk & Western Ry. Co.*, 104 F.3d 89 (6th Cir. 1997), the United States Court of Appeals, Sixth Circuit, considered a general release issue in regard to employee FELA claims against a railroad employer. In *Babbit*, the Court considered the claims of plaintiff-employees under FELA on the grounds the defendant-railroad was responsible for hearing loss during the course of their employment. At issue in *Babbitt* was a general release signed by the plaintiffs upon resignation from the railroad. The Sixth Circuit determined:

> where there exists a dispute between an employer and employee with respect to a FELA claim, the parties may release their specific claims as part of an out-of-court settlement without contravening the Act. However, where the release was not executed as part of a specific settlement of FELA claims, 45 U.S.C. § 55 precludes the employer from claiming the release as a bar to liability. *Philadelphia, Baltimore, & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 612, 32 S. Ct. 589, 591-92, 56 L. Ed 911 (1912). **To be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him.**

Babbitt, 104 F. 3d at 93 (emphasis added).

¶26. In the case presently before this Court, the only known injury at the time McDaniel signed the release was the severe back injury he suffered as a result of a defective hand brake. Although McDaniel was x-rayed approximately one month prior to signing ICRR's release form, the x-ray was not read until several months after he signed the release. Furthermore, there is no evidence McDaniel was aware he may have a potential asbestos-related injury. Therefore, in accordance with the Sixth Circuit's view, the release McDaniel signed would not bar him from settlement.

¶27. Similarly, in *Wicker v. Consol. Rail Corp.*, 142 F.3d 690 (3d Cir. 1998), the United States Court of Appeals, Third Circuit, also considered the FELA claims of plaintiff-employees who were injured due to exposure to toxic chemicals during the course of their employment with defendant-railroad. However, *Wicker* failed to fully adopt the Sixth Circuit's rationale in Babbitt. Instead of applying the Sixth Circuit's bright-line rule, *Wicker* noted "that what is involved is a very fact-intensive process, but trial courts are competent to make these kinds of determinations." *Id.* at 701. Furthermore, *Wicker* provided "where a release merely details a laundry list of diseases or hazards, the employee may attack that release as boilerplate, not reflecting his or her intent." *Id.*

¶28. Hence, it is patently clear the Third Circuit strongly disfavors the use of "blanket releases" as applied in FELA claims. *Wicker* provided an example of what constitutes a sufficient release:

> a release that spells out the quantity, location and duration of potential risks to which the employee has been exposed-for example toxic exposure-allowing the employee to make a reasoned decision whether to release the employer from liability for future injuries of specifically known risks does not violate § 5 of FELA.

Id. at 701. Accordingly, *Wicker* ultimately held:

> As noted, we hold that § 5 of FELA allows an employer to negotiate a release of claims with an employee provided the release is limited to those risks which are known by the parties at the time the release is negotiated. In the case before us, we find the releases signed by the parties violate § 5 because they purport to settle all claims regardless whether the parties knew of the potential risks.

Id. at 702.

¶29. The release McDaniel signed as a result of an on the job injury settlement, covered a vast and extensive spectrum of potential injuries which could potentially arise in McDaniel's future.[6] Also, included within the language of the document appears the following phrase: THIS IS NOT A RECEIPT FOR WAGES—IT IS A GENERAL RELEASE. This further evinces that the release at issue was in fact the dreaded "laundry list" general release, disfavored by both *Babbitt* and *Wicker*. The language found in the McDaniel release is clearly an overbroad list of generic hazards, rather than the specific risks of asbestos McDaniel faced. Therefore, pursuant to the Third Circuit's school of thought McDaniel's release would not pass muster under § 5 of FELA.

¶30. Conversely, ICRR propounds the United States Supreme Court decision of *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 68 S. Ct. 296, 92 L. Ed. 242 (1948), is controlling

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[6] The following portion of the release at issue reads like a "laundry list" of potential claims from which ICRR sought exemption:

> . . . the undersigned does hereby fully, completely and forever release, discharge, and acquit Illinois Central Railroad Company. . . from any and all claims, losses, damages, injuries or diseases which are presently known to exist and were or are directly or indirectly caused by or resulting from injuries which occurred on or about May 4, 1998, as well as any alleged exposure of the undersigned to asbestos, coal dust, sand, silica, welding fumes, brass fumes, diesel fumes, fuel fumes, paint vapors, methylbromide, ammonia, gas, lead, PCB, dioxin, or other toxic or noxious chemical exposure and all other fumes, dusts, mists, gases and vapors from any chemical or agent, injuries or diseases which are presently known to exist and were or are directly or indirectly caused by or resulting from the exposure of the undersigned to noise, including incidents or exposures which may have aggravated any pre-existing condition, as well as injuries to the upper extremities of my body including neck, shoulders, arms and wrists due to repetitive motion/strain and/or cumulative trauma—commonly known as Carpal Tunnel Syndrome, while the undersigned was in the employ or environment of the Illinois Central Railroad Company. . . .

authority. However, this Court does not agree due to numerous factual and legal dissimilarities between *Callen* and this case. *Callen* involved an instance where a plaintiff suffered a severe back injury during the course of his employment with the railroad. The plaintiff eventually filed suit against the railroad as a result of the injuries he sustained. Among its defenses to liability, the railroad claimed the plaintiff executed a valid release specifically pertaining to the plaintiff's claims arising out of the back injuries involved in the suit. *Callen*, 332 U.S. at 626-27. The release at issue in *Callen* arose out of the plaintiff's back injury and was specifically designed and executed for future litigation as a result of that back injury. *Id.* The facts in *Callen* present an issue where a release arose out of the specific injury alleged. Conversely, the McDaniel release initially arose out of McDaniel's back injury. However, ICRR asserts the release as a defense to payment for McDaniel's current asbestos related injuries because the broad verbiage of the release creates an anticipatory laundry list of possible injuries effectively throwing in everything but the kitchen sink. Therefore, *Callen* is clearly distinguishable from the case at bar.

¶31. After due consideration, this Court finds the holdings of the Sixth and Third Circuits are compelling authority as applied to this case. Further, after applying the holdings of both the Sixth and Third Circuits, we find McDaniel's release was ineffective under § 5 of FELA to preclude his claim against ICRR for asbestos related injuries; to hold otherwise would produce an unconscionable result. Therefore, the circuit court did not abuse its discretion in finding McDaniel's release ineffective in this case. Thus, McDaniel's claim should not be released.

McWilliams

¶32. McWilliams, a former ICRR employee, entered into settlement negotiations with ICRR after being diagnosed with asbestosis. In accordance with the settlement agreement, Mc-

Williams submitted the requisite supporting documentation regarding his illness, and ICRR agreed to payment. Prior to tendering payment, ICRR forwarded a release to McWilliams for his asbestos related injuries. McWilliams signed the release and returned a copy of it to ICRR along with a letter explicitly stating "[t]he enclosed copies are not effective until such time as payment set forth above has been made by ICRR." Further, the letter provided that ICRR would be sent the original copy of the release upon receipt of the settlement amount. However, approximately one week later McWilliams sent an additional letter notifying ICRR he had been diagnosed with cancer and would be withdrawing his claim, for which he had not been paid.

¶33. ICRR argues McWilliams settled his asbestosis claim and effectively released ICRR from any future claim. This argument fails on several fronts. First, the letter McWilliams attached to the copy of the signed release clearly demonstrated the copies of the release would not be effective until ICRR made payment. Next, ICRR never tendered nor completed any settlement payment whatsoever regarding McWilliams' asbestosis injuries. Finally, the settlement agreement provided that "[p]rior to payment, any plaintiffs' diagnosis could change: i.e., a plaintiff with a current diagnosis of asbestosis or asbestos related pleural disease could develop a malignancy, or a plaintiff with asbestos related pleural disease could be diagnosed with asbestosis." The circuit court considered this very issue regarding McWilliams and determined:

> My ruling on that case is, if in fact the agreement between Illinois Central and the plaintiffs allowed him to change his type of claim upon a new diagnosis prior to his being paid, and he changed his diagnosis prior to being paid, it falls within that section; and you need to look at the new diagnosis.

¶34. Pursuant to the settlement agreement between the parties, McWilliams was allowed to change his type of claim because he notified ICRR of his change of diagnosis prior to payment. Therefore, the circuit court did not abuse its discretion in its findings. This issue is without merit.

IV. CROSS-APPELLANT KELLY ROBINSON—STATUTE OF LIMITATIONS

¶35. On cross-appeal, Robinson argues the circuit court erred in finding the applicable FELA statute of limitations, under 45 U.S.C. § 56, had run as to his claim. 45 U.S.C. § 56 states:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Compliance with 45 U.S.C. § 56 is a condition precedent to an injured employee's recovery in a FELA action." *Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983) (citing *Gulf, Colorado & Santa Fe R.R. Co. v. McClelland*, 355 F.2d 196, 197 (5th Cir. 1966)). "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." *Emmons*, 701 F.2d at 1118 (citing *Carpenter v. Erie R.R. Co.*, 132 F.2d 362, 363 (3d Cir. 1942), *cert denied*, 318 U.S. 788, 63 S. Ct. 983, 87 L. Ed. 1155 (1943)).

¶36. In 1989, well over three years before this case was filed, Robinson was diagnosed with pulmonary fibrosis. With this knowledge in hand, the circuit court found:

> With respect to Kelly Robinson, I believe that this claim should be barred by the statute of limitations and dismissed because he was diagnosed with pulmonary fibrosis in 1989. The diagnosis at least put the plaintiff on notice of the accrual of his cause of action and the statute of limitations ran in 1992.

The circuit court applied the United States Supreme Court case of *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L.

Ed. 1282 (1949), in ruling Robinson's claim was barred. *Urie* offers "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." 337 U.S. at 170. Stated another way, as related to this case, Robinson's claim for an asbestos related injury will begin to run when Robinson knew or reasonably should have known the injury was present.

¶37. Also, the circuit court applied the Federal District Court's opinion in *Williams v. S. Pac. Trans. Co.*, 813 F. Supp. 1227 (S.D. Miss. 1992) to Robinson's claim for asbestos related damages. In *Williams* the Federal District Court propounded "the federal courts have applied the discovery [rule] (an objective, 'knew or should have known' test) to determine when the limitation period begins to run." *Id.* at 1232; *see Emmons*, 701 F.2d at 1119 (limitation period begins to run when claimant becomes aware that he has been injured and that his injury is work related); *Fries v. Chi. & Nw. Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990) (the test is an "objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause"); *Albert v. Me. Cent. R.R. Co.* 905 F.2d 541, 544 (1st Cir. 1990); *Townley v. Norfolk & W. Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989). Further, *Williams* decreed:

> Actual knowledge by the plaintiff of the governing cause of the injury is not necessary to a finding that the cause of action has accrued. Further, it is not necessary that the plaintiff be formally advised by a physician or receive a medical diagnosis as to the cause of injury for the action to accrue. Nor must the injury reach its maximum severity before the cause is deemed to accrue. The action accrues when the injury first manifests itself to the plaintiff. As recognized by the courts, the discovery rule imposes an affirmative duty on plaintiff to investigate the potential cause of his injury. This is a fair rule since

> the discovery rule should not be abused by plaintiffs who are aware that an injury exists yet choose to ignore it and fail to investigate the cause. Obviously, such a course of wilful inaction has the potential of visiting prejudice upon defendants who may be blind-sided by lawsuits long after the complained-of negligence.

Williams, 813 F. Supp. at 1232 (citations omitted).

¶38. After due consideration, we find the circuit court properly applied the aforementioned precedent to this case in rendering its ultimate finding. Furthermore, there is nothing in the record demonstrating Robinson met his burden of proving he commenced his action within the three-year limitation period. After hearing arguments by both parties, the circuit court was in the best position to determine whether Robinson's claim should be barred by the statute of limitations. In line with this notion and the applicable standard of review, this Court finds Robinson has failed to show the circuit court committed a clear error of judgment. Therefore, the circuit court has not abused its discretion, and this issue is without merit.

CONCLUSION

¶39. For the aforementioned reasons the circuit court did not abuse its discretion by ordering enforcement of the settlement agreement. Moreover, the circuit court did not abuse its discretion by finding cross-appellant Robinson to be barred pursuant to the statute of limitations defense, as provided in the contingent settlement agreement. Therefore, the judgment of the circuit court is affirmed regarding all issues.

¶40. AFFIRMED.

WALLER AND COBB, *P.JJ.*, DIAZ, EASLEY, CARLSON AND DICKINSON, *JJ.*, CONCUR. GRAVES, *J.*, CONCURS IN RESULT ONLY. RANDOLPH, *J.*, NOT PARTICIPATING.

APPENDIX B

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, MISSISSIPPI

CAUSE NO. 2000-100

ROBERT ALLEN, *et al.*,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY.

ORDER

THIS CAUSE, having come before this Court for hearing on October 15, 2004, at the Jefferson County Courthouse in Fayette, Mississippi, and the Court having heard and considered the argument of counsel and thoroughly reviewed the briefs submitted by both parties, does hereby find as follows:

1. That, Defendant's Motion to Compel Compliance with the March 29, 2004 Agreement and Supplement to Motion to Dismiss Certain Claims is not well taken and should be overruled; and

2. That, Plaintiffs' Motion to Enforce Settlement should be granted, in part, and denied, in part;

    A. That, based on the facts and controlling law, the prior releases asserted by the Defendant herein, as to the Plaintiffs, Milton McDaniel, and Bettye McWilliams, Executrix of the Estate of Larry McWilliams, Deceased, are invalid as a release of the current asbestos injury claims, and that the Defendant should pay unto these Plaintiffs the settlement amounts as previously agreed upon by the parties;

B. That, based on the facts and controlling law, the Three-Year Federal Employer's Liability Act statute of limitations had run prior to the suit filed herein as to Plaintiffs, Kelly C. Robinson and Roy Campbell, Sr., and as such the claims of these Plaintiffs should be dismissed;

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the Defendant's Motion to Compel Compliance with the March 29, 2004 Agreement and Supplement to Motion to Dismiss Certain Claims is not well taken and is hereby overruled.

IT IS, THEREFORE, FURTHER, ORDERED AND ADJUDGED, that the Plaintiffs' Motion to Enforce Settlement is granted as to Plaintiffs, Milton McDaniel and Bettye McWilliams, Executrix of the Estate of Larry McWilliams, Deceased, and Defendant should pay unto these Plaintiffs, the settlement amounts as previously agreed on by the parties.

IT IS, THEREFORE, FURTHER, ORDERED AND ADJUDGED, that the Plaintiffs' Motion to Enforce Settlement is denied as to Plaintiffs, Kelly C. Robinson and Roy Campbell, Sr., and said Plaintiffs' Claims are hereby dismissed with prejudice.

IT IS, THEREFORE, FURTHER, ORDERED AND ADJUDGED, that pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure, the Court finds that there is no just reason for delay and the Court directs that this is a Final Judgment as to the particular claims adjudged herein.

SO, ORDERED AND ADJUDGED, this the 8th day of December, 2004.

/s/ Lamar Pickard
LAMAR PICKARD
CIRCUIT JUDGE

A COPY OF SAID ORDER TO BE MAILED VIA U.S. MAIL FROM THE CIRCUIT COURT ADMINISTRATOR TO THE FOLLOWING:

William S. Guy, Esquire
Post Office Box 509
McComb, MS 39649-0509
Attorney of record for the
Plaintiffs herein

Glenn F. Beckham, Esquire
Post Office Drawer 8230
Greenwood, MS 38930-8230
Attorney of record for the
Defendant herein

APPENDIX C

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, MISSISSIPPI

NO. 2000-100

ROBERT ALLEN, *et al.*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

and

NO. 2001-65

ELBERT EAKINS, *et al.*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

TRANSCRIPT OF THE PROCEEDINGS
HAD ON THE 15TH DAY OF OCTOBER 2004,
BEFORE THE HONORABLE LAMAR PICKARD

APPEARANCES:

THOMAS BROCK, ESQUIRE
WILLIAM GUY, ESQUIRE
GLENN BECKHAM, ESQUIRE
LONNIE BAILEY, ESQUIRE

REPORTED BY: Theresa S. Lumley, CSR
Official Court Reporter
Judicial District
Post Office Box 310
Hazlehurst, Mississippi 39083
(601) 894-3311
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* * * *

THE COURT: Robert Allen, et al. v. Illinois Central, 2000-100; and Eakins v. Illinois Central, 2001-65.

All right. In these two cases we have a motion to enforce the settlement agreement by the plaintiff, motion to compel compliance with the March 29th, 2004, supplementation to the motion to dismiss certain claims by the defendant.

In January of 2004, the plaintiff filed a motion to enforce the settlement agreement in both of these cases due to irregularities in the documentation of certain claims. Illinois Central Railroad opposed these motions. Rather than proceed with the hearings on the issues, the parties negotiated a supplemental agreement designed to restore Illinois Central Railroad's confidence in the settlement procedures; is that correct?

The plaintiff's counsel agreed to provide Pulmonary Questionnaires on all the remaining plaintiffs by June 1st, 2004, or dismiss the claims. Plaintiff's counsel advised that they would supply an affidavit from each remaining plaintiff in both cases identifying all asbestos litigation involving those plaintiffs; is that correct?

On June 24th of this year, we had a hearing and I opened—reopened the discovery and directed the parties to file briefs in anticipation of a final hearing on the settlement issues. We had a second hearing on all these issues on August 2nd. There was a settlement agreement in place, but eight of the Allen plaintiffs remain unpaid; is that correct?

MR. BROCK: Yes, sir.

THE COURT: And 24 or 25 of the Eakins plaintiffs have not been paid. Illinois Central is refusing to pay these plaintiffs under the settlement agreement for six different reasons, and I'll go over each of these reasons. [6] Is that okay?

All right. The defendant claims that the plaintiffs filed false affidavits so the settlement procedures are so tainted with impropriety that they should be declared void and all remaining claims should be dismissed first. This applies basically to all the plaintiffs except Herbert Gee and Kelly Robinson; is that right?

The defendant claims that the disclosure affidavit submitted by the plaintiffs are false; specifically, 56 of 58 of them are false. They claim that 31 of the remaining 33 plaintiffs in these cases are also plaintiffs in other asbestos cases named McNeil and Acuff. They claim since they was not disclosed, it violates the settlement agreement and these plaintiffs should be dismissed; is that correct?

The plaintiffs argue that the sole purpose of the affidavit was to establish to Illinois Central that none of the remaining unpaid plaintiffs had been involved in asbestos litigation prior to the present cases. The plaintiffs argue that McNeil and Acuff were filed after the cases at bar. They assert that the suits filed after the present cases do not give rise to a limitations defense or any other defense raised by Illinois Central. They claim that the accidental omission of these two cases does not affect settlement agreements; is that correct?

MR. BROCK: Yes.

THE COURT: All right. Your—I think this case will turn on what your supplemental agreement says. If the plaintiffs were only to disclose prior, and I emphasize "prior" participation in asbestos litigation, then I believe that the court should disregard this argument and allow them to recover provided

they have complied with all other aspects of the settlement agreement. If it says to disclose all participation in asbestos litigation, both past and present, then that may be another situation, and I need to determine whether this is such bad faith or a material breach of the agreement that it warrants dismissal of the plaintiffs. I need to know what the supplemental settlement agreement says.

MR. BECKHAM: May I respond, Your Honor? The March 29th, agreement, Your Honor, does not address the affidavit. The affidavits were supplied to us voluntarily by plaintiffs' counsel when we discovered that one of their other plaintiffs, namely Fred Tyler, had an earlier nondisclosed lawsuit that the statute of limitations has run on. The very affidavits themselves say this: "I have never been a plaintiff in any asbestos suit other than"—and then they list a suit; either none, one or two suits; none of which were the two nondisclosed lawsuits.

In response—in our response that is already on file with the court, there is an exhibit, an April 22nd, 2004, letter from plaintiffs' counsel. It says this: "We will supply an affidavit regarding all prior asbestos litigation. If a plaintiff has been involved in prior litigation, we will provide you with any document that we can obtain for your review." Again, the affidavit themselves say, "I have never been a claimant in any suit other than," and then they list suits, none of which were the two lawsuits that we had to discover on our own.

Secondly, the affidavits cannot be construed to mean that they only applied to lawsuits filed after Robert Allen—excuse me, before Robert Allen or Eakins because all of the lawsuits or virtually all of them that were disclosed in these affidavits were, in fact, filed after Robert Allen and Eakins.

MR. BROCK: Good morning, judge. This situation came up, like Mr. Beckham said, about one of the plaintiffs named Fred Tyler. And through medical records, we all found out that he had seen Dr. McArthur and may have had a prior

lawsuit. We don't know. I don't know. To this date I don't know if he was in a prior lawsuit or not back in the '90s, which gave the railroad or would have given the railroad a statute of limitations defense or at least a potential statute of limitations defense. And so in response to that we voluntarily dismissed Mr. Tyler's case, but we undertook volun-tarily to assure the railroad that their—that the remaining unpaid plaintiffs weren't involved in some similar prior litigation like back in the mid-'90s that might give rise to a potential statute of limitations defense. So we went to all of our unpaid plaintiffs, talked to them individually, I did it myself, and to make sure, you know, they weren't involved in any prior asbestos litigation, they had not some other attorney that had represented them in an asbestos case that might give rise to a statute of limitations defense.

And so we then supplied the railroad with affidavits on all of these remaining plaintiffs, and I've got one here if the court would like to look at it, it's very short, which basically says, I, John Doe, Social Security number, whatever date of birth hereby state under oath the following: I have never been a plaintiff or a claimant in any asbestos suit other than Allen v. Illinois Central Railroad in the Circuit Court of Jefferson County, Mississippi and Moore v. Garlock, Inc., in the Circuit Court of Smith County, Mississippi. And I'll readily admit that the two lawsuits that he's talking about, the Acuff and the McNeil lawsuit were not put in here. It was totally inad-vertent. It was my fault.

None of these plaintiffs were trying to withhold any information. They didn't know, you know. They just know that they weren't in prior litigation.

Furthermore, the fact that they may be in Acuff or McNeil has no bearing on the issues before the court on these unpaid plaintiffs because the only issue that could possibly be before the court would be a potential statute of limitations defense. These cases were filed after Allen and Eakins. There's no

way in the world that they could give rise to a statute of limitations defense. The affidavits are inaccurate, and I apologize to the court and to these attorneys for that. It's my fault, but I want the court and these attorneys to know that we were bending over backwards to try to establish to Illinois Central and these attorneys that these unpaid plaintiffs had not been involved in prior asbestos litigation, and I will—

THE COURT: The import of the prior litigation, counsel, is notice to the plaintiff of a claim; is that correct?

MR. BECKHAM: Excuse me?

THE COURT: The import of the prior litigation would be because it would have noticed the plaintiff of a condition and began the statute of limitations to run; is that correct?

MR. BECKHAM: That's one of the reasons, Your Honor.

THE COURT: What would be the other reason?

MR. BECKHAM: The other reason we're interested in finding about prior litigation is that earlier litigation also may have associated with it a release which releases us and all other parties in the world.

Thirdly, any other litigation, Your Honor, would also give us notice of other defendants whom may have exposed these plaintiffs to asbestos and thus give rise to an indemnification claim or a contribution claim by us to recover whatever money, through settlement or otherwise, that we may be inclined to pay, but if the question is how are we prejudiced by their failing to know this, yes, the statute of limitations is one.

Now, they stand up today and say, well, there's not any prior cases and we would have told you. How in the world given the fact we now have 50 something false affidavits can we rely on that assertion? We would have to research every courthouse in the United States of America.

THE COURT: I can't answer that for you, counsel.

MR. BECKHAM: We've only been able to research some of them at this point. I would also like to address, Your Honor, if I could, counsel's assertion that this was mere inadvertence or that they overlooked these two lawsuits. We have filed in the court—and we have sent the court a timeline. Your Honor, the McNeil, Dresser case, one of the cases that they filed on September 10th, 2002, within the next two weeks after filing McNeil v. Dresser that we found on our own through our investigation here recently, within the next two weeks, they filed seven Pulmonary Questionnaires under the settlement agreement by plaintiffs in Robert Allen that were false.

Over the next 11 months after the filing of McNeil v. Dresser, over 150 sworn Pulmonary Questionnaires were filed by people who were plaintiffs in Dresser and they didn't disclose it. Then the next case is filed Acuff v. American Optical in Jones County. This is another case that we just recently discovered on August 27th, 2003. Within 90 days after filing that lawsuit, three more false Pulmonary Questionnaires are filed by plaintiffs who were plaintiffs in both the Dresser case and Acuff.

And then, Your Honor, over the next five months, over 50 plaintiffs in these two lawsuits, Eakins and Robert Allen, submit these affidavits which are false. Most of these plaintiffs were not just plaintiffs in Dresser, but were plaintiffs in both Dresser and the Acuff lawsuit.

A couple of these affidavits, Your Honor, are particularly notable in terms of their assertion that this was somehow inadvertent. The court will note that the first of the non-disclosed lawsuits is styled Charlie McNeil v. Dresser Industries. Charlie McNeil, he's the first named plaintiff in that lawsuit. He signs an affidavit failing to disclose that lawsuit.

Phillip Acuff is the lead—the named lead plaintiff in Jones County. He signs an affidavit failing to disclose that lawsuit.

Your Honor, we also submitted in that timeline other discovery responses that were filed in other cases: In the Irby case in Smith County; in the Burton case in Jefferson County. The only reason we burdened this court with those filings in those other cases is to demonstrate to the Court that this was not and could not be inadvertence. Over a period of two years since the filing of Dresser, there have been over 200 occasions wherein plaintiffs or attorneys should have provided this information in truthfully answering discovery but did not do so, and that's why we believe these cases should be dismissed.

MR. BROCK: Judge, our settlement agreement in Allen and Eakins provide the railroad with three potential defenses: Statute of limitations that the plaintiffs was never an employee of the railroad, and there's one more, and it escapes me right now, but I'll think of it in a second. But in filling out these Pulmonary Questionnaires, there is a question about, you know, any other asbestos litigation, and we answered that and we identified whatever lawsuit they're in like Moore, that's the primary asbestos lawsuit that we have for these gentlemen. Acuff and McNeil were cases filed regarding a settlement procedure and there's been no activity in the case. It was just a filing. One of them I don't think the defendant answered; they told us they weren't going to answer, but a lawsuit had to be filed. And so they haven't been active lawsuits, and in spite of what Mr. Beckham says, the omission from the affidavit was inadvertent and it was not intentional. It would benefit us in no way to, you know, to omit it. There's no reason for us to omit it. It gives them no defense to have it on there.

And as far as what he's saying about knowing about other potential parties, these cases are settled. There's not going to be any indemnification from this. And they have the informa-

tion now. If they want to go out and seek some kind of case against these companies, they can do so, but there's absolutely no prejudice. This was an inadvertent omission on my part, and I apologize to the court. Perhaps it was done—perhaps the affidavits were done too hastily. We were really trying to bend over backwards to get information to the railroad because we went through a period of time last year and the first part of this year where the railroad attorneys would not communicate with us at all about these cases. We would call and ask, you know, "What do you need on these guys? What's missing? Why can't we get these people paid?" And the lawyers would say, "We've been instructed not to communicate with you. We can't tell you." They wouldn't tell us. And so we really and truly have bent over backwards trying to provide information to the railroad. I apologize again that these two lawsuits were omitted from the affidavits, but I will state again to the court and these attorneys, it makes absolutely no difference to the issues that are before the court, and to dismiss these plaintiffs would be a very severe sanction for something that's not even relevant.

MR. BECKHAM: Briefly, Your Honor, I just would like to point and ask the court to take a look at the case we cited in our response, Pierce v. Heritage Properties. It talks about this idea that the lying plaintiff in the Pierce case put forward to the court that somehow the defendant has to demonstrate prejudice. Prejudice is not an issue here. It's the sanctity and dignity of the court.

Finally we've already discussed and put in the record how we've been prejudiced by this, and we would ask the court to dismiss the case—dismiss these cases. If the court does not dismiss these cases, we believe that we've already set forth in our responses—we believe we've already set forth in the responses and the documents that are on file with the court the other reasons, Your Honor, why particular claims

should not be paid for particular reasons. Including a number of that—

THE COURT: I'm going to get into that. I'm dealing with this issue alone. I don't think that the—I believe you, counsel, that these things were omitted by inadvertence. I will suggest to you that when you're dealing with something that's—I mean, if we were talking about a simple letter, you inadvertently left something out of a letter to the Illinois Central or something to that effect, that's one thing, but when you're signing an affidavit or having people sign affidavits, if they're swearing to things that are inadvertently wrong, that can have serious consequences. I mean, an affidavit is something that you need to make sure is correct before you allow the plaintiffs or whoever to sign it. In any event, the errors have been discovered. I don't think there's any prejudice.

The agreement that we're talking about I have not seen, but apparently it does not contain any provision for disclosure. I don't consider this to be such bad faith or material breach of any agreement since it wasn't in there that it would warrant a sanction of dismissal for the plaintiffs, so I'm going to overrule on that.

MR. BECKHAM: May I make one statement for the record?

THE COURT: Not about that.

MR. BECKHAM: The only thing I was going to say, the Pulmonary Questionnaires that were a part of the settlement agreement asks about other cases.

THE COURT: Now, prior releases, on August 2nd, I believe I stated I had previously ruled that the hearing loss release did not bar the claims for asbestos-related injuries. However, I did allow you to brief the issues and assured you that I would review it again which I have done.

On the issue of the other releases, I believe I told y'all that y'all could also brief that, but if they were identical to the hearing loss releases, I'll probably rule the same as I had on both cases. I have reviewed all these things, and it appears that I did not see anything that would change my prior ruling as to these cases.

The Milton McDaniel, Phil Acuff, C. H. Cobb, Charles Brown, William Johnston, Johnny Mitchell, William Carlisle, Clythus Mason, Dan Jones, York Sit, Charles Warren, Lamar Clark, Milton McDaniel, James Carpenter, I don't believe—my earlier ruling would also apply in this situation. After reviewing all relevant releases and reviewing the body of law on this subject, the court finds at follows: In Callen v. Pennsylvania Railroad, the U. S. Supreme Court held that the releases do not violate Section 5 of the FELA. The court held that a release is not a device to exempt from liability, but is a means of compromising a claimed liability, and to that extent recognizing its possibility. That court further held that where controversies exist as to whether there is liability, and if so for how much, Congress has not said that the parties may not settle their claims without litigation. Therefore, the releases in the case at bar do not violate Section 5 of FELA; however, that does not mean that they operate to release all claims that the plaintiffs may have against their employer.

The defendants rely on Loyal v. Norfolk Southern Corporation, a Georgia Court of Appeals case for the proposition that the releases at issue cover all claims past and present. The court feels that Babbitt, Wicker and Damron v. Norfolk and Western Railway Company, all federal cases, are more persuasive authorities on this issue.

In Babbitt, the 6th Circuit held that a release could not serve as a bar to employee's claims under FELA unless it was clearly executed as a settlement for a particular injury. The court in Babbitt went on to say that in order for a release to be valid under FELA, it must reflect a bargained-for settlement

of known claim for a specific injury as contrasted with an attempt to extinguish potential future claims employees might have arising from injuries known or unknown by him.

Similarly, in Wicker, the 3rd Circuit held invalid blanket releases which attempt to cover all liability by reciting a series of generic hazards which the plaintiff may have been exposed. That court found that those releases did not demonstrate the employees knew of the actual risks to which they were exposed and from which the employer was being released. This court has previously held that hearing loss releases does not operate to release Illinois Central from asbestos-related injury claims. The court sees no reason to change course and depart from its prior ruling on this issue.

In William Allen v. Illinois Central Railroad, Cause No. 2002-88, this court held that the plaintiffs' who executed such releases did, in fact, release pending asbestos exposure claims but since the claims were filed after the releases, they were not pending at the time the plaintiff signed them; therefore, the release did not operate to keep them from recovering under the settlement agreement entered into by the parties. In light of the foregoing considerations of fact and law, the court finds that releases executed by the aforementioned plaintiffs does not bar them from participation in the settlement agreement.

In regard to James Expose, I believe, that deals with carpal tunnel, I feel that he should be dismissed from the settlement because his carpal tunnel release was signed on May the 10th, 2004, some four years after the present case was filed. Therefore, his claim was pending, and it was known at the time of the release.

The pertinent part of the carpal tunnel release reads as follows: "The undersigned does fully, completely and forever release, discharge and acquit the Illinois Railroad Company." It goes on to say, "of and from any and all claims, losses,

damages and injuries and/or other conditions including surgeries and effects of surgeries directly or indirectly caused by or resulting from the undersigned's years of service with Releasees, when the undersigned, while working as an employee of Illinois Central Railroad Company. . . . It is understood and agreed that this settlement agreement and release is intended to release any and all claims for any and all injuries or conditions suffered or alleged to have been suffered as a result of the above-referenced employment for Releasees."

It goes on to state, "It's further understood and agreed that this is a full and complete release from any and all claims which are known or reasonably could have been known and the damages resulting therefrom, whether for personal injuries or otherwise." For that reason I feel that particular claim and that particular plaintiff should be dismissed from the settlement.

As to the statute of limitations ruling based on medical records, on August 2nd I held that you could do more discovery for 30 days until September 2nd in order for the court to have more evidence upon which to make a call. The defendant argued that the settlement procedure in both cases reserved Illinois Central Railroad the right to reject settlement of claims for which the statute of limitations has run. The FELA statute of limitations is three years; is that right?

They argue that the following plaintiffs should be dismissed because they fall outside of the applicable limitation period: In Eakins, Mr. Hubert Deer and Willie Mobley, and in Allen, Kelly Robinson. Pursuant to the FELA's applicable statute of limitations involving occupational diseases is three years from the date that plaintiff knew or should have known of his alleged medical condition.

In Urie v. Thompson, the U. S. Supreme Court held that the statute of limitations under FELA begins to run when the

plaintiff should have or could have discovered the injury. In Williams v. Southern Pacific Transport Company, the federal court for the Southern District of Mississippi held in the case of an occupational disease where symptoms do not immediately manifest themselves, the cause of action does not accrue until the plaintiff is aware or should be aware of his—or accrues when the first injury manifests itself to the plaintiff. The plaintiff need not know the cause of the injury or receive formal medical diagnosis for the action to accrue. There is no requirement that the injury reach its maximum severity before the cause of action is deemed to accrue.

As to Hubert Deer, the court finds that the statute of limitations has not run despite the fact that his lawyers told him that he may have asbestos because he went to the doctor and was not diagnosed with asbestosis outside of the limitations period. Therefore, the court finds that it is not reasonable to expect that he should have reasonably known of the accrual of his cause of action. He was diligent in going to the doctor regularly. He was not put on notice of his disease because he was not diagnosed with it until April 2nd, 1998, well within the limitations period.

With respect to Willie Mobley, I'll hold the same as above. The limitation period had not run. He went to the doctor but was not diagnosed with asbestosis outside of the limitations period, so there's no reason to think he should have known of the accrual of his action.

With respect to Kelly Robinson, I believe that this claim should be barred by the statute of limitations and dismissed because he was diagnosed with pulmonary fibrosis in 1989. The diagnosis at least put the plaintiff on notice of the accrual of his cause of action and the statute of limitations ran in 1992.

With respect to Roy Campbell, I also believe that this claim should be dismissed because of the FELA statute of

limitations. The defendant states that Mr. Campbell died on July 3rd, 1995. The Allen case at issue was not filed until June 26th, 2000. This would be outside of the FELA's three year statute of limitations. This is a case—seems to me that Mr. Campbell should be dismissed due to the applicable statute of limitations.

I believe you had mentioned something about medical reasons, negative chest x-rays or CAT scans subsequent to the diagnosis of asbestosis disease. On August 2nd I held that you can do more discovery for 30 days until September 2nd in order for the court to have more evidence to make a call on this. The sole issue relating to this is to be decided basically from the discovery was the competence of the physicians in diagnosing the asbestos-related disease.

I believe the defendant claims this applies to Charles McNeil, Lester Ray Warren and Willie Woodberry. I had given you more time to depose the secondary diagnosing physician, but I have not seen anything on these depositions. So without seeing something on the depositions, it appears that I should allow them to remain in the settlement because the secondary diagnosis was not made by a B reader, someone who has expertise in the matter.

Relating to the missing documentation, I believe on August 2nd—we're talking about these Railroad Retirement Board printouts; is that correct? I believe on August 2nd I held that the documents needed to be provided to the defendants but I gave you more time because you were having trouble getting the documents; is that right? And I believe that the only plaintiff in dispute here is Bernard Banks; is that correct?

MR. BAILEY: So far as the railroad retirement board, yes, sir.

THE COURT: Well, I think that will give you sufficient time, counsel.

MR. BROCK: I think we may be dealing with a situation where in light of the time period he worked, which was, I think, in the '40s for not a very long period of time, that they just don't have any records.

THE COURT: Well, there's not any way you can give it to them then.

MR. BAILEY: Your Honor, does that mean that Mr. Banks is going to be dismissed from the settlement?

THE COURT: Yes, sir. This situation here, the Illinois Central claims that the Pulmonary Questionnaires were submitted too late for, I believe, for seven folks; is that right?

MR. BAILEY: Yes, sir, Your Honor. There were seven folks who did not submit their pulmonary questionnaire by the time the plaintiffs agreed to in the March 29th supplemental—

THE COURT: Well, to dismiss these claims would be, in effect, a sanction. I mean, they were—they were eventually submitted; is that correct?

You did get them?

MR. BAILEY: They were 16 days late, Your Honor. And the agreement that plaintiffs' counsel entered into on behalf of the plaintiffs provided simply we will either provide you by June 1st, 2004, with a Pulmonary Questionnaire or we will dismiss these cases. It's—

MR. GUY: Your Honor, they probably breached that agreement also. They just didn't conform to that agreement.

THE COURT: To dismiss those claims would be a sanction, and, counsel, frankly I see things every day—lawyers have an awful hard job complying with schedules and doing the things that they're supposed to do, and I'm certainly not condoning this. If you say you're supposed to have something to them on a certain day, you need to get it there, but by the same token, I feel like ruling that a

questionnaire card that's 16 days late to dismiss their client would be to effect sanction a party for the tardiness on the part of their lawyer, and I'm not comfortable doing that. I don't feel that that sanction is appropriate in this case.

MR. BROCK: Judge, I think that addresses all of the issues. There are—I do want to ask the court about one thing that we talked about on August 2nd, but those seven we've submitted all that information to the railroad, and I don't know if it would be premature to talk about a time to try to come back to the court or maybe give the railroad a certain time to tell us whether they're going to pay those people or not, and if they're not, why not, then we can come back to the court on those seven.

We also have a gentleman that we talked about on August 2nd that the court ruled that the railroad should pay the claim of Larry McWilliams. That was the gentlemen who withdrew his claims for asbestosis and resubmitted for lung cancer, and so I guess we need to prepare an order to reflect the court's ruling, and I can just put Mr. McWilliams in with the rest of these.

MR. BAILEY: We offered in our briefs further argument about Mr. McWilliams. I don't think there's any reason for us to belabor it any further. The Court has already ruled. If our briefs didn't sway you to change your ruling, he needs to be included.

Your Honor, there are—Mr. Brock mentioned the seven—you mentioned about the late Pulmonary Questionnaires. There are actually ten plaintiffs total that we have not dealt with either in these briefs or—and there were three that were timely on as far as the June 1st deadline but we just got them shortly before that deadline, so there's actually ten out of the total between the two case or 35 or whatever it is that we haven't even asked Your Honor to rule on them because we're still obtaining medical records to see if we have statute of limitation defenses, medical defenses, that sort of thing.

MR. BROCK: The only thing I would ask, judge, is that we have some kind of reasonable time frame for this because three of the questionnaires were submitted in May, and then seven in June.

THE COURT: Let me ask you this: I would hope that y'all are still not entering into settlement agreements whereby the court has to administrate settlement funds. I hope that's over.

MR. BROCK: Yes, sir. And I would add, too, that we're talking like there's ten of these people. There's actually nine because Mr. Campbell was one of those ten, so that's going to be nine.

THE COURT: Okay. Thank you.

* * * *

CERTIFICATE OF COURT REPORTER

I, Theresa S. Lumley, Official Court Reporter and Notary Public in and for the Twenty-Second Circuit District, State of Mississippi, do hereby certify that to the best of my skill and ability I have reported the proceedings had and done in the motion of Allen and Eakins v. Illinois Central Railroad, being Cause Number 2000-100 and 2001-65 on the docket of the Circuit Court of Jefferson County, Mississippi, and that the above and foregoing 30 pages contain a true, full and correct transcript of my stenographic notes and tape taken in said proceedings.

I do further certify that my certificate annexed hereto applies only to the original and certified transcript and electronic disks. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or direction.

This the 27th day of October 2004.

_____

Theresa S. Lumley

APPENDIX D

45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

APPENDIX E

ILLINOIS CENTRAL RAILROAD COMPANY

Final Settlement Release and Agreement
Not to Return to Work

I, MILTON L. McDANIEL, of the City or Town of CARBONDALE, State of ILLINOIS for the sole consideration of FOUR HUNDRED FOUR THOUSAND SEVEN HUNDRED FORTY-FOUR DOLLARS ($404,744.00), in hand paid to me by ILLINOIS CENTRAL RAILROAD COMPANY, the receipt of which is hereby acknowledged less the amount of FOUR THOUSAND SEVEN HUNDRED FORTY-THREE DOLLARS AND EIGHTY-SIX CENTS ($4,743.86) from the settlement proceeds and payable to the Railroad Retirement Board for amount paid as sickness benefits under the provisions of the Railroad Retirement Act, the Railroad Retirement Tax Act and the Railroad Unemployment Insurance Act, all as amended, and for no other purpose, the undersigned does hereby release, acquit and forever discharge the ILLINOIS CENTRAL RAILROAD COMPANY, its-predecessors, successors, employees, agents, insurers, officers and assigns from any and all claims, demands, suits, actions, causes of action, and damages whatsoever, which I now have or may have in the future against them, or any of them in consequence, directly or indirectly, known or unknown, of any matter or thing done or suffered by any of them prior to and including the date hereof, including but not limited to, an incident that occurred on or about MAY 4, 1998 at or near CAIRO, ILLINOIS.

IT IS FURTHER UNDERSTOOD AND AGREED that, in consideration for the sum mentioned above, the undersigned does hereby fully, completely and forever release, discharge, and acquit ILLINOIS CENTRAL RAILROAD COMPANY, its parent, subsidiary, predecessors, successors, employees, agents, insurers, officers, and assigns, and all other persons,

firms or corporation liable, of who may be claimed to be liable from any and all claims, losses, damages, injuries or diseases which are presently known to exist and were or are directly or indirectly caused by or resulting from injuries which occurred on or about MAY 4, 1998, as well as any alleged exposure of the undersigned to asbestos, coal dust, sand, silica, welding fumes, brass fumes, diesel fumes, fuel fumes, paint vapors, methylbromide, ammonia gas, lead, PCB, dioxin, or other toxic or noxious chemical exposure and all other fumes, dusts, mists, gases and vapors from any chemical or agent, injuries or diseases which are presently known to exist and were or are directly or indirectly caused by or resulting from the exposure of the undersigned to noise, including any incidents or exposures which may have aggravated any pre-existing condition, as well as all injuries to the upper extremities of my body, including neck, shoulders, arms and wrists due to repetitive motion/strain and/or cumulative trauma—commonly known as Carpal Tunnel Syndrome, while the undersigned was in the employ or environment of the ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, and/or its parent, subsidiary, and affiliated companies or its predecessors or successors.

IT IS FURTHER UNDERSTOOD AND AGREED that this Release includes any and all claims under Title VII of the Civil Rights Act of 1964, 42. U.S.C. §2000(e) *et seq.*; any and all claims under the Civil Rights Act of 1866 42 U.S.C. §701 *et seq.*; any and all claims under the Age and Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*; any and all claims under the Americans With Disabilities Act, 42 U.S.C. §12101 *et seq.*; any and all claims under the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.*; any and all contract or tort claims; any and all other claims under any federal, state or local statute or ordinance or under any federal, state or local law.

IN FURTHER CONSIDERATION for the amount received, MILTON L. McDANIEL warrants and asserts that he has no other injury or damages claims to bring against the ILLINOIS CENTRAL RAILROAD COMPANY.

IT IS FURTHER UNDERSTOOD AND AGREED that by signing this Final Settlement Release and Agreement Not to Return to Work, the undersigned is taking the risk that what he was told by any doctor or other person with regard to his injuries may have been wrong and the doctor or other person may have made mistakes with respect to the injuries, condition or disease involved. Even if that should be the case, it is understood and agreed that this Final Settlement and Agreement Not To Return To Work is binding and effective.

THE ILLINOIS CENTRAL RAILROAD COMPANY is authorized to withhold from the settlement proceeds and pay to the Railroad Retirement Board $4,743.86 on account of sickness benefits paid for the MAY 4, 1998 injury. It is understood that the apportionments and deductions made herein are for the purpose of complying with the Railroad Retirement Act, the Railroad Retirement Tax Act and the Railroad Unemployment Insurance Act, all as amended, and for no other purpose. The net sum of $400,000.14 is payable to the undersigned on the date of this agreement.

IT IS FURTHER UNDERSTOOD AND AGREED that this settlement is a compromise of a disputed claim and is not to be construed as an admission of liability on the part of the ILLINOIS CENTRAL RAILROAD COMPANY and its predecessors which liability is expressly denied, and that the denial of liability has been taken into consideration in connection with the negotiation for the amount of consideration paid for this Release.

IT IS FURTHER UNDERSTOOD AND AGREED that this is the full and complete release from any and all claims or damages arising during the employment of the undersigned to the present date, whether for personal injuries or for property

damage. It is understood and agreed that this Release is intended to discharge any and all tortfeasors from liability for any such injury, condition or disease.

IT IS FURTHER UNDERSTOOD AND AGREED THAT AS A FURTHER CONSIDERATION for the foregoing payments, the undersigned hereby releases the ILLINOIS CENTRAL RAILROAD COMPANY from any and all claims filed pursuant to any collective bargaining agreement, or otherwise, concerning any claim of the undersigned for reinstatement of his employment or for any compensation for lost wages, and it is understood and agreed that the undersigned will direct his union or any other entity to dismiss and withdraw any such claim.

IT IS FURTHER UNDERSTOOD AND AGREED by the undersigned that the alleged injuries of the undersigned render him physically incapable of continuing in the employment of the ILLINOIS CENTRAL RAILROAD COMPANY, and as part of this settlement, and as further consideration for the payment of the above sum, the undersigned hereby agrees not to return to work or attempt to return to work with the ILLINOIS CENTRAL RAILROAD COMPANY and agrees to execute a separate document entitled Agreement Not To Return to work effective JUNE 18, 1999.

IT IS FURTHER UNDERSTOOD AND AGREED THAT the ILLINOIS CENTRAL RAILROAD COMPANY will pay for a period of no more than *four* years from the date of this Release, for any routine medical expenses which are directly attributed to the injuries (i.e. lower back, hips and groin area) sustained by the undersigned on MAY 4, 1998 for which this settlement was made, per the maximum agreed total (aggregate) limit.

IT IS FURTHER UNDERSTOOD AND AGREED THAT the ILLINOIS CENTRAL RAILROAD COMPANY will waive the collection of the amount paid to the undersigned by the ILLINOIS CENTRAL HOSPITAL ASSOCIATION for

supplemental sickness benefits in the amount of $22,323.18 for the MAY 4, 1998 incident.

THE UNDERSIGNED FURTHER AGREES as a condition of payment hereunder that he shall not publish or disclose the terms and conditions of this settlement and payment except when absolutely necessary to his attorneys, tax and accounting advisors, and to the appropriate tax authorities.

IT IS FURTHER UNDERSTOOD AND AGREED THAT the ILLINOIS CENTRAL RAILROAD COMPANY will pay any and all cost to make an allocation to the U.S. Railroad Retirement Board for any months needed to credit the undersigned with thirty (30) years of service if needed. However, from all information received the undersigned has the required amount of months credited to his account.

This Release, the apportionments made herein, and the deductions authorized herein are fully understood by me and constitute the entire agreement between the parties hereto. This Release is executed solely for the consideration expressed above, without any other representation, promise or agreement of any kind whatsoever.

THIS IS NOT A RECEIPT FOR WAGES—IT IS A GENERAL RELEASE

Signed and sealed this 18th day of JUNE, 1999.

/s/ Milton L. McDaniel (Seal)
MILTON L. McDANIEL

/s/ Ruth Corene McDaniel (Seal)
Witness

/s/ Gary L. Neeble (Seal)
Witness

I have read and understand this a final settlement and release.

M.L.M

OPPOSITION BRIEF

1

No. 06-763

IN THE
Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

MILTON McDANIEL,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION

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January 2007

QUESTION PRESENTED

Whether the court below correctly held that, under section 5 of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 55, a broad general release contained in an agreement settling a specific injury claim does not bar a later FELA claim based on an injury unknown at the time the release was signed and unrelated to the settled claim.

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STATUTES & RULES

45 U.S.C. § 55 2

S. Ct. R. 10 6

Decrying a "morass of competing standards" for assessing the validity of an agreement purporting to release claims under the Federal Employers' Liability Act (FELA), Pet. 7, petitioner Illinois Central Railroad Company (ICRR) urges this Court's review of a decision allowing respondent Milton McDaniel to collect compensation from ICRR for his asbestos injury. The morass, however, exists only in ICRR's imagination. In reality, the circuit courts have stated only two standards, and the two significantly overlap. Moreover, the outcome of this case would be the same under either standard, as the court below expressly found.

ICRR also claims that the decision below is inconsistent with *Callen v. Pennsylvania Railway Co.*, 332 U.S. 625 (1948). Although the facts of the two cases are different, their holdings are fully compatible. And no circuit court decision supports ICRR's view that *Callen* allows FELA employers to obtain comprehensive relief from all potential liability through a "laundry list" release executed in the course of settling one specific injury claim.

STATEMENT OF THE CASE

In 1998, while working for ICRR, Milton McDaniel suffered a severe back injury due to a defective hand brake. Mr. McDaniel sent a demand to ICRR, and he and ICRR subsequently settled his claim.

As part of the settlement, Mr. McDaniel signed an agreement that included broad language releasing ICRR from liability for a variety of matters unrelated to his back injury, including injury from exposure to asbestos. At the time the back-injury settlement was signed, Mr. McDaniel was unaware that he had any other work-related injury. He had attended an asbestos screening the month before signing the release, but the x-ray was not read until several months afterward. Mr. McDaniel testified in deposition in this case that he was told that the release would have no bearing on asbestos claims that

might later accrue. He was not represented by counsel with respect to his back-injury claim and settlement.

Mr. McDaniel later learned that he had suffered an asbestos-related injury. He then submitted a claim for compensation pursuant to a settlement of asbestos claims in a case entitled *Allen v. ICRR*. ICRR disputed his claim, arguing that the release in the back-injury settlement precluded his recovery for asbestos injury. The trial court disagreed with ICRR, granted Mr. McDaniel's motion to enforce the *Allen* settlement, and ordered ICRR to pay Mr. McDaniel the amount previously agreed to in *Allen*.

ICRR appealed, raising several issues involving several claimants. With respect to the only issue presented in ICRR's petition for certiorari, the state supreme court considered whether the release in the back-injury settlement agreement precluded a subsequent claim based on asbestos-related injury or whether, under FELA section 5, the release was invalid as to Mr. McDaniel's asbestos injury. Section 5 states, in relevant part: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C. § 55.

To analyze this question, the court considered the language and circumstances of the release, the decision in *Callen*, and two federal court of appeals decisions that bear on the issue. *See Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (3d Cir. 1998); *Babbitt v. Norfolk & Western Ry. Co.*, 104 F.3d 89 (6th Cir. 1997). The court held that the release in the back-injury settlement did not release the asbestos claim under the holdings of any of the three cases.

REASONS FOR DENYING THE WRIT

I. NO CONFLICT IN THE CIRCUITS AFFECTS THE OUTCOME OF THIS CASE.

ICRR argues that three circuit courts have "splintered" in three ways. However, the outcome of this case would be the same under the law of each of those circuits, as the court below expressly found. Moreover, the cases ICRR cites are largely in agreement. And they all support the proposition that a broad general release, such as the release at issue in this case, is inadequate to bar unknown claims unrelated to the specific claim addressed in a settlement.

A. The Circuit Court Tests.

ICRR bases its argument that the lower courts are in conflict on three cases: *Babbitt*, *Wicker*, and *Sea-Land Service, Inc. v. Sellan*, 231 F.3d 848 (11th Cir. 2000).

In *Babbitt*, several retired former employees brought FELA claims for hearing loss. The company argued that the claims had been released through a broad general release incorporated into a retirement agreement that the company had offered to the employees. In discussing the validity of the release, the court recognized that a release of FELA claims can have the same effect as a release of other claims, "in that it may constitute a settlement or compromise, rather than an attempt to escape liability." 104 F.3d at 92 (citing *Callen*, 332 U.S. 625). However, where the release is not a compromise of a claim of liability, but an "attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him," section 5 bars the release. *Id.* at 93; *see also Philadelphia, Balt., & Wash. R.R. Co. v. Schubert*, 224 U.S. 603, 612-13 (1912) (agreement conditioning acceptance of benefits on release of claims invalid under FELA). The court

thus remanded the case to the district court for a determination whether the release was executed as part of a settlement of injury claims. *Id.*

In *Wicker*, the Third Circuit was presented with an entirely different set of facts. Rather than a release presented as a "take-it-or-leave-it option offered to all employees," 142 F.3d at 699 (describing *Babbitt*), *Wicker* concerned broad releases in five individual agreements settling particular back-injury claims and asbestos claims. In each case, the individual later brought claims related to injury caused by on-the-job exposure to toxic chemicals. In this context, the court held that a release does not violate section 5 if it is executed for valid consideration as part of a settlement and the scope of the release is limited to those risks that are known to the parties. The court emphasized the fact-bound nature of the inquiry, noting that the release itself provides strong but not conclusive evidence of the parties' intent. For example, "when a release merely details a laundry list of diseases or hazards, the employee may attack that release as boiler plate, not reflecting his or her intent." *Id.* at 701. In contrast, where "a release chronicles the scope and duration of the known risks, it would supply strong evidence in support of the release defense." *Id.*

Finally, *Sea-Land* concerned a release contained in a 1995 agreement negotiated to settle a back-injury claim by an employee whose physician said that the injury would prevent the employee from returning to work. The agreement provided that, if the employee ever in the future worked aboard a ship owned by Sea-Land, he would do so at his own risk, and the company would bear no responsibility for any injuries he suffered aboard the ship. Two years later, the employee nonetheless was cleared for work by a union doctor and was dispatched from the union hiring hall to work aboard a Sea-Land vessel. Three weeks later, the employee re-injured his

back at work. In response to the employee's claim for compensation, Sea-Land argued that he had released any claims in the 1995 agreement. The court agreed. Citing both *Babbitt* and *Wicker*, the court held that the release was valid to bar a subsequent back-injury claim. 231 F.3d at 852. "The Agreement was intended to prevent the very risk at issue here." *Id.*

Although ICRR argues that *Sea-Land* states a different test than *Wicker*, the cases are actually in complete agreement. In fact, when ICRR (at 16) purports to quote *Sea-Land*'s holding, it is actually quoting *Sea-Land*'s own quotation of *Wicker*'s holding. *Sea-Land*, 231 F.3d at 852 ("Contrary to Sellan's argument, enforcement of the Agreement is consistent with the *Wicker* holding that . . . ."). And while ICRR describes the *Wicker* test as more "fact-intensive," *Sea-Land* expressly agrees that, "[a]s noted in *Wicker*, cases involving the validity of releases under FELA are fact-driven." *Id.* (citation omitted). Accordingly, the court's analysis in *Sea-Land* is based heavily on consideration of the facts surrounding the 1995 agreement and the subsequent claim.

B. The Decision Below Is Consistent With Both *Babbitt* And *Wicker*, As The Opinion Expressly Explains.

The circuit court cases present no conflict affecting this case. Rather, the outcome here is the same under both *Babbitt* and *Wicker*, as the court below held. *See* Pet. App. 16a. Because the circuit court disagreement described by ICRR is of no consequence here, this case is a poor vehicle for evaluating the scope of FELA section 5.

"[T]he only known injury at the time that McDaniel signed the release was the severe back injury he suffered as a result of a defective hand brake." Pet. App. 13a. Therefore, the

court below held that, under *Babbitt*, which holds that a release of unknown FELA claims is invalid, the release signed by Mr. McDaniel in connection with settlement of his back-injury claim did not bar him from participating in the asbestos settlement. *Id.*[1]

In addition, the release signed by Mr. McDaniel "covered a vast and extensive spectrum of potential injuries which could potentially arise in McDaniel's future." *Id.* 15a. (Notably, the release at issue here is strikingly similar to the release signed by Mr. Wicker. *Compare id.* 43a-44a, *with Wicker*, 142 F.3d at 693.) The court below found that the release "is clearly an overbroad list of generic hazards, rather than the specific risks of asbestos McDaniel faced." Pet App. 15a. Accordingly, the court held that, under *Wicker*, the release "would not pass muster under § 5 of FELA." *Id.*

Highlighting that this case does not turn on any difference between *Babbitt* and *Wicker*, the court below noted that the release here was denominated a "general release," which "further evinces that the release at issue was in fact the dreaded 'laundry list' general release, disfavored by both *Babbitt* and *Wicker*." *Id.*[2]

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[1]ICRR (at 14) seems to disagree with the court's finding, *see* Pet. App. 13a, that there was no evidence that Mr. McDaniel was aware that he had a potential asbestos-related injury. ICRR has not sought review of that factual finding, which in any event would not be an appropriate subject for this Court's review. *See* S. Ct. R. 10.

[2]ICRR (at 20) characterizes the releases allowed in *Sea-Land* and *Callen*, discussed *infra* Part II, as more general than

(continued...)

Because the outcome here is the same under both *Babbitt* and *Wicker*, the Court's review is unwarranted in this case.

C. The Disagreement Between The Sixth And Third Circuits Affects Few Cases.

ICRR also overstates the differences among the circuits. As discussed above, *Sea-Land* distinguishes *Babbitt* and expressly relies on the holding in *Wicker*. Its holding is consistent with both cases and establishes no new approach. Thus, to the extent that there is any disagreement among the circuits, it is limited to the Sixth and the Third.

Nonetheless, the Third and the Sixth Circuit decisions agree in many ways. *Babbitt* and *Wicker* agree that a valid release of FELA claims must be negotiated as part of a settlement of an existing claim. *Babbitt*, 104 F.3d at 93; *Wicker*, 142 F.3d at 690, 700. Both agree that the release can

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[2](...continued)
the release in this case. As to *Callen*, this characterization is plainly wrong. *See* 332 U.S. at 626-27 (release included "all claims or demands which I have or can or may have against the said Pennsylvania Railroad Co. 'for or by reason of personal injuries sustained by me' *at the time and place involved in the suit*. It also released claims for loss of time and expense.") (quoting release) (emphasis added). And the injury at issue in *Callen* was the specific injury in dispute when the parties settled. *Id.* at 627. Likewise, in *Sea-Land*, although the release purported to include additional claims, the court found that the claim at issue in the case was the precise claim that the settlement agreement was intended to resolve. 231 F.3d at 852 ("The Agreement was intended to prevent the very risk at issue here.").

extend to known claims. 104 F.3d at 93; 142 F.3d at 700. Both agree that the release cannot extend to unknown risks. 104 F.3d at 93; 142 F.3d at 700-01. And both disfavor broad releases cataloguing a laundry list of potential but unknown claims. 104 F.3d at 93; 142 F.3d at 701.

The difference between the cases is that *Babbitt* would not allow releases of *unknown claims*, whereas *Wicker* would allow releases of unknown claims *if* they are based on known risks and the parties clearly intended to release the unknown claims. *See Wicker*, 142 F.3d at 700-01 (making this distinction). The release in *Babbitt* apparently was not executed as part of the settlement of any claim but was instead a general release offered to numerous retiring employees. As a result, one cannot say how the Sixth Circuit would rule in a case where an agreement settling a claim for a specific injury also released claims for known risks and where, as outlined in *Wicker*, the release was not a "laundry list" but manifested both parties' intent to release claims related to the specified risks. In fact, such releases appear to be unusual, or at least unlitigated, because ICRR has cited no case in which the release fits this description. *See* Pet. 15-17. Rather, each of the cited cases would be resolved similarly under the holding of either the Sixth or the Third Circuit.[3] Indeed, the validity of the releases

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[3]All but one of the five state intermediate court cases cited by ICRR (at 15-16, 17) involved a broad general release, disfavored by both the Sixth and Third Circuits. The case that did not involve a "laundry list" release concerned a release specifically limited to the accident that was subject of the settlement. *See Stephens v. Alabama State Docks Terminal Ry.*, 723 So. 2d 83, 86 (Ala. Civ. App. 1998).

at issue in *Babbitt* and *Wicker* themselves would be resolved the same in either Circuit.

Moreover, this Court denied the petition for certiorari in *Wicker* and in a subsequent case from the court of appeals of Ohio that raised the same issue presented here. *See Consolidated Rail Corp. v. Wicker*, 525 U.S. 1012 (1998); *Norfolk & Western Ry. Co. v. Anderson*, 543 U.S. 926 (2004). The only circuit court since *Wicker* to have addressed the question presented here is the Eleventh Circuit in *Sea-Land*, which, as discussed above, is consistent with both the Sixth Circuit's and the Third Circuit's approach. *See supra* p. 5. Accordingly, this case is no more worthy of review than were *Wicker* and *Anderson*. Just as the Court denied those petitions, so too should it deny this one.

II. THE DECISION BELOW IS CONSISTENT WITH *CALLEN*.

ICRR also contends that the decision below is inconsistent with this Court's decision in *Callen v. Pennsylvania Railroad Co.*, 322 U.S. 625 (1948). As the court below explained, ICRR is incorrect.

In *Callen*, the plaintiff suffered a back injury during the course of his work and brought a FELA action against the employer railroad. The railroad argued that the employee had previously settled the back-injury claim and released all claims "'for or by personal injuries sustained by [him]' at the time and place involved in the suit." *Id.* at 626-27 (quoting release). The plaintiff argued that he understood the release when he signed the settlement agreement and "intended to waive any further claim," *id.* at 627, but that, at that time, he had not realized the extent of his back injury. He also argued that the release violated FELA section 5.

This Court disagreed that the release violated section 5. The Court briefly explained that section 5 bars a release that attempts to exempt the employer from liability, but does not bar a release used to compromise a claimed liability. *Id.* at 630-31. Therefore, "[w]here controversies exist as to whether there is liability, and if so for how much, . . . parties may settle their claims without litigation." *Id.* at 631. Releases in such cases "stand on the same basis as the releases of others." *Id.* at 630. *See also Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263, 266 (1949) (*Callen* "distinguished a full compromise enabling the parties to settle their dispute without litigation, which we held did not contravene the Act, from a device which obstructs the right of the Liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause.").

Thus, here, the release signed by Mr. McDaniel is valid as to his back-injury claim. That claim was in actual controversy at the time and was the only FELA claim that Mr. McDaniel had raised. As in *Callen*, if Mr. McDaniel later learns that his back injury is more serious than he had realized, the release will preclude him from filing a new back-injury claim. However, in contrast to the release at issue in *Callen*, "the broad verbiage of the release [at issue here] creates an anticipatory laundry list of possible injuries effectively throwing in everything but the kitchen sink." Pet. App. 16a. *Callen* did not address this situation, but its holding is consistent with the holding below. *Callen* recognizes the validity of a release to settle a claim in "controversy," but no asbestos claim was in controversy at the time of the back-injury settlement.

ICRR's assertion (at 12) that the decision below "directly conflicts" with *Callen* is simply incorrect. Notably, no circuit court decision supports ICRR's reading of *Callen*.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 2007

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[4]ICRR has filed a petition for certiorari in *ICRR v. Acuff*, No. 06-971 (docketed Jan. 16, 2007), in which it presents the same questions presented in this case. Although in the *Acuff* petition ICRR urges the Court to consider the two petitions together, ICRR's largely *verbatim* repetition in *Acuff* of the same reasons for granting the writ as are argued in this case adds nothing to the cert-worthiness of this case and offers no useful reason to delay consideration of this petition.

(2)

Supreme Court, U.S.
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No. 06-763

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

MILTON MCDANIEL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent accepts that *Callen v. Pennsylvania Railroad*, 332 U.S. 625 (1948), held that settlement releases of Federal Employers' Liability Act (FELA) claims "stand on the same basis as the releases of others." *Id.* at 630; Opp. at 10. That basis was the general principle of freedom of contract. Unless a settlement is a sham or violates enacted public policy, parties may strike a deal on narrow or broad terms, limited to known events or allocating the risk of uncertainties, and a contract embodying that deal will be enforced.

Respondent seeks to read *Callen* narrowly, as validating only settlement releases of specific claims that are "in 'controversy,'" Opp. at 10, *i.e.*, ripe, and for "known" injuries, Opp. at i, 5-6. But *Callen* is not so limited, factually or legally. The release validated there precluded subsequent claims from the accident that had been the origin and focus of the settlement negotiations. However, the fact of an injury was "known," but its extent was not: as of the release it was understood to be a mere "weakness," 332 U.S. at 627; plaintiff later alleged it was "a severe and permanent back injury," *id.* at 626. *Callen*, and the freedom of contract principles underlying it, are not limited to a known controversy. Moreover, notwithstanding ***factual*** differences, the opinion below is irreconcilable with *Callen*'s ***legal interpretation*** of § 5.

Respondent also accepts that the opinion below addresses a "disagreement" among federal courts of appeal that has existed since 1998. Opp. at 7 (discussing *Babbitt v. Norfolk & W. Ry.*, 104 F.3d 89 (6th Cir. 1997), and *Wicker v. Consol. Rail Corp.*, 142 F.3d 690 (3d Cir. 1998)). *Babbitt* adopted a "known ***injury***" standard, which respondent appears to join the Mississippi Supreme Court in endorsing. *See* Pet. App. 16a, ¶ 31 ("applying" *Babbitt*); Opp. at i (court below "correctly held" that broad general release does not bar later FELA claim based on "injury unknown" when release signed

and "unrelated" to settled claim). The Third Circuit and the Eleventh Circuit have expressly rejected that standard, instead adopting a "known ***risk***" standard. *See Wicker*, 142 F.3d at 701; *Sea-Land Serv., Inc. v. Sellan*, 231 F.3d 848, 852 (11th Cir. 2000). That majority position is irreconcilable with respondent's proposed "in 'controversy'" limitation to *Callen*, Opp. at 10, since a mere "known ***risk***," as opposed to a "known ***injury***," does not typically create an Article III "controversy."

Respondent argues that the decision below is consistent with the "known risk" majority standard. Opp. at 5-7. But he cannot deny that the Third and Eleventh Circuits, in *Wicker* and *Sea-Land*, interpreted § 5 as leaving in place the general validity of settlement releases of "known risks," regardless of whether they entailed or had matured into "known injuries," "known claims," or ripe "controversies" as of the settlement. And, he does not and cannot deny that, when he signed the release here, work-related injury from exposure to asbestos was a "known risk" to him. He had been x-rayed for that risk a month earlier, and had discussed "asbestos claims that might later accrue" while negotiating the release, Opp. at 1-2.[1]

Respondent could not prevail under the "known risk" standard stated in *Sea-Land* and *Wicker*, just as he could not prevail under the normal principles of freedom of contract that govern FELA releases according to *Callen*. Only if § 5

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[1] There is an unresolved factual dispute as to what was said (as opposed to written in the contract) about how the release might affect those potential claims. *See* note 7, *infra*. Respondent ignores the important factual points in the text in asserting that the court below made a "finding" that "there was no evidence that Mr. McDaniel was aware that he had a potential asbestos-related ***injury***." Opp. at 6 n.1 (emphasis added). As Section II explains below, that appellate court statement was not a factual "finding," and was addressed to the "known injury" standard, not the "known risk" standard. Respondent plainly knew he was at risk of the asbestos-related injuries for which he had just been x-rayed, and which he raised as an issue in the negotiations.

imposes a further limitation on the freedom of contract—by confining releases under FELA to claims already "in 'controversy,'" Opp. at 10, or to "known injuries," *id.* at i, 5-6, or by prohibiting all "broad releases," *id.* at 8—is the decision below correct. No such limitations appear in § 5, or in *Callen*. The arguments for such extra limitations are properly addressed to the merits (or Congress), but afford no reason for denying review.

Respondent also asserts that the acknowledged circuit split "affects few cases." Opp. at 7-9. He focuses solely on appellate decisions, and ignores the reality that appellate decisions are just the tip of the iceberg, especially on issues of contract law. Most FELA claims are settled. As the precedents reflect, a great many of those settlements involve what respondent calls "broad general release[s]." Opp. at 8 n.3. If respondent and the court below are correct in their interpretation of § 5, those multiple-risk releases, which are a significant part of the consideration for which railroads make payments in many settlements every year, may not be worth the paper they are written on. The questions presented are important. Whatever their resolution, employers and employees need a clear statement of the federal law that determines the validity of the deals they have made or will make.

I. THE DECISION BELOW CONFLICTS WITH *CALLEN*

Respondent attempts to distinguish *Callen* as involving a single injury. As such, he insists, the injury at issue was already "known" and "in 'controversy'" when Mr. Callen signed his release. Opp. at 10. While the fact of the event causing Mr. Callen's injury was known when he signed his release, its severity and permanence were not. Anyway, nothing that this Court wrote in *Callen*, and nothing that Congress wrote in § 5 of FELA, prohibiting only "exemptions," distinguishes between old and new injuries, between known and unknown or uncertain injuries, or between injuries that

were "in 'controversy'" and those that were not when the release was signed.

Under respondent's view, there could be no valid release of any claim that was not already "in 'controversy,'" *i.e.*, accrued and known, at the time of the release. *See* Opp. at 10. Thus, § 5 would disable the parties from agreeing on compensation for even a known risk of an occupational injury or disease, even if the event, circumstance, or exposure (to a substance or environment) giving rise to the risk had already occurred.

Neither this Court nor Congress has announced such an extraordinary curtailment of the freedom of contract. In enacting § 5 of FELA in 1908, Congress did not distinguish among single injury, recurring injury, multiple injury, or other categories of cases. It only proscribed provisions meant to "exempt" the carrier "from any liability created by [the Act]." "Exemption" denotes a prospective "freedom from" or "immunity from" a law otherwise imposing legal consequences of future actions. BLACK'S LAW DICTIONARY 463 (2d ed. 1910). One "exempt" from a legal requirement has no obligation to abide by it; failure to do so gives rise to no rights in or liabilities to others. "Releases" were legal instruments commonly used at then, as now, to "giv[e] up [] a right, claim, or privilege . . ." and were recognized as being fundamentally different from "exemptions." *Id.* at 1011. Section 5 did *not* address "releases."

Section 5 was aimed at what was said to be the practice of railroads a century ago, when FELA was enacted, to obtain "exemptions" by "insist[ing] on a contract with their employees[] discharging the company from liability for personal injuries." H.R. Rep. No. 60-1386 at 6 (1908). As the Court stated in *Callen*: "It is obvious that a release is not a device to exempt from liability. . . ." 332 U.S. at 631. Releases that "recogniz[e the] possibility" of liability are not proscribed "exemptions." *Id.* Congress did *not* say that rail-

road employees may not settle and release actual or potential claims arising out of their employment by agreement with their employer and without litigation where, as here, "controversies exist as to whether there is liability. . . ." *Id.* at 631. The uncertainty about liability for asbestos-related injuries, due to the absence of asbestos-related injury test results, did not bar settlement of that potential liability with a valid release.

Moreover, neither respondent nor any of the decisions he cites has identified any language in § 5 that sanctions the extensive regulatory rules adopted by either the "known claim" courts or the "known risk" courts, especially those that display a bias against what they term "boilerplate" or "laundry list" release provisions. The sole operative term in § 5—"exempt"—simply will not bear that heavy weight, especially if considered in light of the legal lay of the land when Congress chose to use that term in 1908.[2] No court has identified any reason to believe that that the 60th Congress would have intended, by precluding prospective "exemptions" from liability, a departure from the then prevalent freedom of parties to contract, to include agreements to

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[2] The initial version of FELA, enacted in 1906, had been invalidated by a divided Court in the *Employers' Liability Cases*, 207 U.S. 463 (1908). While the present FELA was later upheld (*Second Employers' Liability Cases*, 223 U.S. 1 (1912)), Congress must be understood to have proceeded cautiously in the second FELA as to possible interference with the liberty of contract that divided the Court.

In *Philadelphia, B. & Wash. R.R. v. Schubert*, 224 U.S. 603, 612-13 (1912) (cited in Opp. at 3), the provision at issue related to an "employee relief fund" pre-dating any injury or claim. It provided that action under FELA would suspend benefits, that any compromise of the claim would preclude any claim on the fund, and that acceptance of benefits from the fund would release and satisfy all claims. *Id.* at 606-07. The Court held that both versions of FELA recognized benefits under relief funds, and such immunity provisions were barred by § 5. *Id.* at 611-13. It did not address whether a release was a prohibited "exemption."

release potential claims. Nor has respondent. *Cf. Coppage v. Kansas*, 236 U.S. 1 (1915).[3]

Nor does *Callen* support respondent's distinction, which relies heavily on *Callen*'s ruling that "[w]here controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." 322 U.S. at 631; *see* Opp. at 10. Respondent appears to infer that only "controversies" that are ripe in an Article III sense and known to the parties, and not known risks arising from past occurrences that may give rise to ripe claims in due course, may be settled. *Id.* But there is simply no basis for such an inference.

At issue here is a genuine settlement release, prompted by respondent's claims based on actions and events prior to the release that could give rise to future liability to respondent. It was not a sham "exemption" or "device to exempt from liability," *Callen*, 332 U.S. at 631. The release respondent signed concerned liability for present or future results of events that had already occurred in the course of his employment—including his alleged pre-release asbestos exposure, which is what is at issue in this case. It did not purport, nor is it invoked here, to "exempt" the railroad from liability from future employment activity. If the plain language of § 5 is followed, it is not an invalid "exemption," but a release that "stand[s] on the same basis as the releases of [non-FELA claims]." *Id.* at 630.

II. THE DECISION BELOW CONFLICTS WITH THE 3RD AND 11TH CIRCUITS' DECISIONS

Respondent recognizes a "disagreement" between the Sixth and Third Circuits: the Sixth Circuit opted in *Babbitt* for a

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[3] *See generally* Epstein, *Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire*, in THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed. 1999); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

"known claim" test which the Third Circuit in *Wicker* rejected in favor of a "known risk" test, a rejection echoed by the Eleventh Circuit in *Sea-Land*. Opp. at 7.[4] Respondent claims, wrongly, however, that the circuit split "is of no consequence here." Opp. at 5.

First, he seeks to minimize the tension between *Wicker*'s complex "known risk" approach and *Sea-Land*'s simpler statement of a "known risk" test. *See* Opp. at 4-5. But the two cases reached opposite results—the release in *Sea-Land* was upheld—and *Sea-Land* contains none of *Wicker's* language "disfavor[ing] broad releases," Opp. at 8, and none of its complex quasi-regulatory requirements, Opp. at 4, upon which he relies.

Second, respondent asserts that the decision below can be reconciled with the "known risk" test because this case involves "'the dreaded "laundry list" general release, disfavored by both *Babbitt* and *Wicker*.'" Opp. at 6 (quoting Pet. App. 15a). However, he fails to address the demonstration (Pet. at 19-22) that (1) the court below went beyond *Wicker* in effectively adopting a *per se* prohibition of broad general releases and applying it even in a case in which the risk at issue was specifically contemplated and discussed by the parties at the time of the release; (2) a rule against broad general releases cannot be squared with *Callen* and *Sea-Land*; and (3) such a rule makes no sense as a matter of congressional intent or policy.

Respondent does *not* deny that the risk at issue here was a "known risk." He concedes "attend[ing] an asbestos screening the month before signing the release," and discussing "asbestos claims that might later accrue" during the negotiation of the release. Opp. at 1-2. He would not have done these things if he did not know or believe that past occupa-

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[4] Respondent notes that *Sea-Land* agreed with *Wicker* that FELA release cases are "fact-driven." Opp. at 5. However, the question presented in this case concerns the standard under which the facts are to be assessed.

tional exposure placed him at risk of asbestos-related injury. He muddles the issue by claiming that the Mississippi Supreme Court made a "finding" that there was "no evidence" that he was "aware that he had a potential asbestos-related ***injury***." *Id.* at 6 n.1 (emphasis added). Like this and other appellate courts, that court neither made nor purported to make a factual finding. He cites no such finding by the trial court. And, the statement addressed the "known injury" test, not the "known risk" test.[5]

In sum, neither respondent nor the courts below have denied, or could deny, that he knew of the risk of asbestos-related injury. Hence, the decision below is irreconcilable with a "known risk" test. Any defense of it must be based on the minority "known injury" test, or on a novel, absolute prohibition on "broad, general releases."

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND THIS CASE, ALONG WITH *ACUFF*, ARE SUITABLE VEHICLES FOR RESOLVING THEM

Respondent asserts that the second question presented, addressed to the circuit split, "affects few cases." Opp. at 7. But he incorrectly re-defines that split as limited to cases that do "not involve a 'laundry list' release." *Id.* at 8 n.3. Broad, general releases that list multiple risks—the kind involved in this case and that respondent disparages as "'laundry list' releases"—are used often because of their economic value to all involved. They have been widely used in reliance on the understanding, informed by *Callen* and basic contract law principles, that nothing in § 5 prohibits the mutual gains by trade they enable. *See* Pet. at 19-22.[6] Contrary to respon-

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[5] Also, the statement appears in the court's discussion of "known injury," Pet. App. 13a, not of the *Wicker* test, Pet. App. 14a.

[6] The Mississippi Supreme Court's antipathy to "laundry list" releases suggests that it might have upheld the release here if only the release were

dent's assertions, those releases *are* implicated both by *Callen*'s validation of releases of FELA claims "on the same basis as the releases of others," 332 U.S. at 630, and by the schism between the "known injury" and "known risk" tests. Even *Wicker* calls for a "fact-intensive" inquiry into intent, in which the fact that listed risks are "specifically known" is just one factor. *See* 142 F.3d at 701; Pet. at 19-20. Respondent and the court below apparently insist that a "'laundry list'" cannot "manifest[] both parties' intent to release claims related to the specified risks." Opp. at 8; *see* Pet. App. 15a, ¶ 29.[7]

Even if the significance of the questions presented were evaluated solely by reference to appellate decisions, on which respondent focuses solely, there is here a divergence from *Callen* and an acknowledged circuit split that since 1998 has deepened, now including as many as four different standards (the Sixth Circuit's "known injury" standard; the Eleventh Circuit's simple "known risk" standard; the Third Circuit's complex, "fact-intensive" "known risk" standard, and now the Mississippi Supreme Court's "known claim" or "known risk" standard with an apparent *per se* prohibition on multiple risk ("laundry list") releases). The questions presented also implicate multiple intermediate appellate decisions, and are

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limited to asbestos-related risks. Yet respondent, the courts below, and the other courts invalidating releases have identified no reason why the inclusion of releases of other types of claim should be dispositive, and respondent's proposed "in 'controversy'" requirement would invalidate even an asbestos-only release here until respondent got test results and put a claim "in 'controversy.'"

[7] Insofar as *Wicker* requires a "fact-intensive" inquiry into intent going beyond the intent expressed in language of the releases, it should lead in this case to a remand for a factual investigation of the dispute between the parties as to what was said in negotiations about the specific issue of the release's effect on respondent's potential asbestos claims. Respondent says he was told the release would not, despite its plain language, affect those claims, *see* Opp. at 1-2; petitioner's witness who negotiated the release with him testified to the contrary. *See* Pet. at 2 n.1.

raised by the pending petition as to twelve further plaintiffs in No. 06-971 (*Ill. Cent. R.R. v. Acuff*). More importantly, however, respondent's narrow appellate focus ignores that the greatest impact of the uncertainties is felt in the context of settlements, which are typically far more numerous than actual, visible lawsuits.[8] Indeed, he wholly ignores the need for guidance not only to courts in deciding cases, but to FELA employers and employees seeking to resolve FELA claims.

Finally, respondent suggests that this case is a "poor vehicle" for assessing the questions presented. Opp. at 5. But again, his argument against *certiorari* assumes the validity of his merits argument that the decision below is consistent with *Callen* and with the "known risk" test. Because the court below invalidated an express and specific release of a "known risk" of injury from past occurrences, *see Wicker*, 142 F.3d at 701; *Sea-Land*, 231 F.3d at 852, which was not a "device to exempt" petitioner as to future occurrences, *see Callen*, 332 U.S. at 631, this case squarely raises the questions presented.

The Court may wish to consider this petition in conjunction with the pending petition in *Acuff*, which presents the same questions with respect to three additional formulations of release terms.

The Court should grant the petition for *certiorari*.

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[8] Respondent contends that the denials of certiorari in *Wicker* and *Anderson v. A.C. & S., Inc.*, 797 N.E.2d 537 (Ohio Ct. App. 2003), *appeal not allowed*, 804 N.E.2d 40 (Ohio 2004), *cert. denied*, 543 U.S. 926 (2004), mean the questions presented have already been deemed uncertworthy. Opp. at 9. *Contra, e.g., Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (unexplained denials of *certiorari* have no precedential value). As of the *Wicker* denial, a year after *Babbitt*, there had been insufficient time for the issue to percolate; the later decisions have shown that the conflict is deepening. *Anderson* was an intermediate state appellate court ruling, which the state supreme court declined to review and this Court rarely reviews.

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